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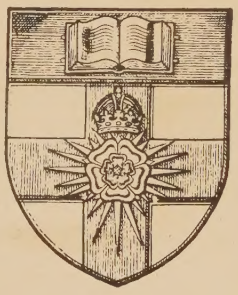

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Adamson, Copin *v.*	345
Andrews *v.* Mayor, &c., of Ryde	302
Ashbury Railway Carriage Company, Riche *v.*	224
Attorney General *v.* Lomas	29
——— *v.* North London Railway Company	330
——— *v.* Pratt	140

B.

Bigge, Treloar *v.*	151
Blanchet *v.* Powell's Llantivit Collieries Company	75
Bluett, Knowlman *v.*	1
———, Knowlman *v.* (Ex. Ch.)	307
Bott, Hiort *v.*	86
Bridger, Nevill *v.*	214

C.

Carleton, Langton *v.*	57
Charlesworth *v.* Holt	38
Child *v.* Hearn	176
Cocks, Towne *v.*	45
Copin *v.* Adamson	345
——— *v.* Strachan	345
Crosse *v.* Raw	209

D.

	PAGE
Daniel *v.* Stepney (Ex. Ch.)	185
Dawson *v.* Fitzgerald	7
Dickeson *v.* Hilliard	79

F.

Fitzgerald, Dawson *v.*	7
Fletcher, Smith *v.* (Ex. Ch.)	64

G.

Gidlow, Lancashire and Yorkshire Railway Company *v.*	35
Gorris *v.* Scott	125
Great Northern Railway Company, Malden *v.*	300
———, Skinner *v.*	298
——— *v.* Swaffield	132
Great Western Railway Company, Williams *v.*	157
Green, Spoor *v.*	99

H.

Hardwick, Mayor of Kidderminster *v.*	13
Hawker, Mill *v.*	309

	PAGE
Hearn, Child *v.*	176
Hermitage *v.* Kilpin	205
Hilliard, Dickeson *v.*	79
Hiort *v.* Bott	86
Holland, Stock *v.*	147
Holt, Charlesworth *v.*	38
J.	
Johnson, Liver Alkali Company *v.* (Ex. Ch.)	338
K.	
Kidderminster (Mayor of) *v.* Hardwick	13
Kilpin, Hermitage *v.*	205
Knowlman *v.* Bluett	1
——— *v.* Bluett (Ex. Ch.)	307
L.	
Lancashire and Yorkshire Railway Company *v.* Gidlow	35
———, Whaite *v.*	67
Langton *v.* Carleton	57
Lawes Chemical Manure Company *v.* Western Counties Manure Company	218
Lee Conservancy Board, Marchant *v.* (Ex. Ch.)	60
Liver Alkali Company *v.* Johnson (Ex. Ch.)	338
Lomas, Attorney General *v.*	29
London and North Western Railway Company, Radley *v.*	71
———, Vaughton *v.*	93
Lord *v.* Price	54
M.	
Malden *v.* Great Northern Railway Company	300
Marchant *v.* Lee Conservancy Board (Ex. Ch.)	60
Martin *v.* Smith	50
Mayor, &c., of the City of London, Thorn *v.*	163
Mayor, &c., of Ryde, Andrews *v.*	302
Mill *v.* Hawker	309
N.	
Nauscawen, Pretty *v.*	42
Nevill *v.* Bridger	214
North London Railway Company, Attorney General *v.*	330
P.	
Powell, Speak *v.*	25
Powell's Llantivit Collieries Company, Blanchet *v.*	75
Pratt, Attorney General *v.*	140
Pretty *v.* Nauscawen	42
Price, Lord *v.*	54
R.	
Radley *v.* London and North Western Railway Company	71
Raw, Crosse *v.*	209
Riche *v.* Ashbury Railway Carriage Company	224
Ryde (Mayor, &c., of), Andrews *v.*	302
S.	
Scott, Gorris *v.*	125
Skinner *v.* Great Northern Railway Company	298
Smith *v.* Fletcher (Ex. Ch.)	64
———, Martin *v.*	50
——— *v.* Smith	121
Speak *v.* Powell	25
Spoor *v.* Green	99
Stepney, Daniel *v.* (Ex. Ch.)	185
Stock *v.* Holland	147
Strachan, Copin *v.*	345
Swaffield, Great Northern Railway Company *v.*	132

T.

	PAGE
Thorn *v.* Mayor, &c., of the City of London	163
Town *v.* Cocks	45
Treloar *v.* Bigge	151

V.

Vaughton *v.* London and North Western Railway Company	93

W.

	PAGE
Western Counties Manure Company *v.* Lawes Chemical Manure Company	218
Whaite *v.* Lancashire and Yorkshire Railway Company	67
Williams *v.* Great Western Railway Company	157
Woad, Wood *v.*	190
Wood *v.* Woad	190

TABLE OF CASES CITED.

A.

		PAGE
Ackroyd *v.* Smithson	1 Wh. & T. L. C. (4th ed.) p. 872	31
Agar *v.* Athenæum Life Assurance Company	3 C. B. (N.S.) 725	252
Allen *v.* Givers	Moor. 179, 185	188
Allerson *v.* Eden	Noy, 5	188
Andrews *v.* Cawthorne	Willes, 536	216, 217
——— *v.* Marris	1 Q. B. 3	312, 314, 316, 327
——— *v.* Paradise	8 Mod. 318	105
Anglo-Moravian Hungarian Junction Railway Company, In re. Dent's Case	Law Rep. 8 Ch. Ap. 771	290
Ashby *v.* White	2 Ld. Raym. 938	202
Atkinson *v.* Newcastle and Gateshead Waterworks Company	Law Rep. 6 Ex. 404	127, 130
Athenæum Life Assurance Company, Re	4 K. & J. 549	253
Attorney-General *v.* Bailiffs of Retford	3 My. & Cr. 484	312, 317
——— *v.* Bouwens	4 M. & W. 171, at p. 191	142, 146
——— *v.* Brunning	8 H. L. C. 243	32, 33, 34
——— *v.* Compton	1 Y. & C. Ch. C. 417	251
——— *v.* Corporation of London	12 Beav. 8	47
——— *v.* Dimond	1 C. & J. 356	142
——— *v.* Hope	1 C. M. & R. 530; 8 Bli. N. R. 44	141, 142, 143, 145
——— *v.* Mayor of Liverpool	1 My. & Cr. 171	312, 317
——— *v.* Wilson	Cr. & P. 1	313
Ayers *v.* South Australian Banking Company	Law Rep. 3 P. C. 548	252
Australasia (Bank of) *v.* Harding	9 C. B. 661	348, 350, 355
——— *v.* Nias	16 Q. B. 717	348, 352

B.

Baglan Hall Colliery Company, In re	Law Rep. 5 Ch. Ap. 346	290
Bagshaw *v.* Eastern Union Railway Company	7 Hare, 114	288
Baird *v.* Williamson	15 C. B. (N. S.) 376	65, 66
Batterbury *v.* Vyse	2 H. & C. 42	194, 201
Baynon *v.* Batley	8 Bing. 256	39
Beale *v.* Sanders	3 Bing. N. C. 850	51
Beatson *v.* Skene	5 H. & N. 838	81, 83
Beaurain *v.* Scott	3 Camp. 388	195, 198

		PAGE
Bective (Countess of) *v.* Hodgson	10 H. L. C. 656	31
Bessant *v.* Great Western Railway Company	8 C. B. (N.S.) 368	180
Bird *v.* Brown	4 Ex. 786	254
Blackmore, Ex parte	1 B. & Ad. 122	214, 216, 217, 218
Blamires *v.* Lancashire and Yorkshire Railway Company	Law Rep. 8 Ex. 283	131
Blisset *v.* Daniel	10 Hare, 493	194, 197, 198, 202, 204
Bloxam *v.* Sanders	4 B. & C. 941, at p. 948	55
Bonomi *v.* Backhouse	9 H. L. C. 503; E. B. & E. at p. 654	99, 105, 106, 108, 111, 116
Bourne *v.* Bourne	2 Hare, 35	32
Bowes *v.* Croll	6 E. & B. 255	51, 53
Boyce *v.* Chapman	2 Bing. N. C. 222	95, 96, 97
Bradley *v.* Copley	1 C. B. 685	55
Brind *v.* Dale	2 Mood. & Rob. 80, at p. 83; S. C. 8 C. & P. 207	343
British Provident Life and Fire Assurance Company, Re. Grady's Case	1 De G. J. & S. 488	253
Brook *v.* Jenney	2 Q. B. 265	313
Brooke, Ex parte	Law Rep. 9 Ch. Ap. 301	147, 148, 149, 150
Brown *v.* Symons	8 C. B. (N.S.) 208	58
Bryant *v.* Foot	Law Rep. 2 Q. B. 161; Law Rep. 3 Q. B. 497	216
Burnett *v.* Wells	12 Mod. 420	220
Buron *v.* Denman	2 Ex. 167	312, 314, 326
Burroughes *v.* Bayne	5 H. & N. 296, at p. 303	88
Bute (Marquis of) *v.* Thompson	13 M. & W. 487	171
Butt's Case	7 Co. Rep. 23	188
Buxton *v.* North Eastern Railway Company	Law Rep. 3. Q.B. 549	180

C.

Capel *v.* Child	2 C. & J. 558, at p. 579	196
Cargo ex Argos	Law Rep. 5 P. C. 134	135, 138
Carstairs *v.* Taylor	Law Rep. 6 Ex. 217	66
Casamajor *v.* Strode	2 Sw. 347, at p. 357	188
Chambers *v.* Manchester and Milford Railway Company	5 B. & S. 588	252
Chitty *v.* Parker	2 Ves. Jun. 271	33, 35
Christy *v.* Row	1 Taunt. 300	138
Clements *v.* Welles	Law Rep. 1 Eq. 200	188
Cocking *v.* Ward	1 C. B. 858	307, 308
Coggs *v.* Bernard	2 Ld. Raym. at p. 918; 1 Sm. L. C. 6th ed. p. 177	340, 342
Coleman *v.* Eastern Counties Railway Company	10 Beav. 1	288
Collinge *v.* Heywood	9 Ad. & E. 633	105
Copper Miners of England *v.* Fox	16 Q. B. 229	21, 23
Corbet's Case	1 Co. Rep. 83 b. at p. 87	188
Cossey *v.* London, Brighton, and South Coast Railway Company	Law Rep. 5 C. P. 146	299, 301
Couch *v.* Steel	3 E. & B. 402	127
Cox *v.* Burbidge	13 C. B. (N.S.) 430, at p. 438	178, 179

		PAGE
Coxhead *v.* Richards	2 C. B. 569	81
Crook *v.* Corporation of Seaford	Law Rep. 6 Ch. Ap. 551	253
Cullen *v.* Trimble	Law Rep. 7 Q. B. 416	126
Custance *v.* Bradshaw	4 Hare, 315	32, 34

D.

D'Arcy *v.* Tamar, &c., Railway Company	Law Rep. 2 Ex. 158	250
Daniel *v.* Metropolitan Railway Company	Law Rep. 3 C. P. 216, at p. 222; Law Rep. 3 C. P. 591; Ibid. 5 H. L. 45	161
Davenport *v.* Coltman	12 Sim. 588, 610	32
Davies *v.* Mann	10 M. & W. 546	71, 74
Dawkins *v.* Lord Rokeby	Law Rep. 8 Q. B. 255	83
De Lancy *v.* Reg.	Law Rep. 5 Ex. 102	33
Dews *v.* Riley	11 C. B. 434	312, 314, 316, 327
Digby *v.* Atkinson	4 Camp. 275	51
Dimes *v.* Petley	15 Q. B. 276	71
Dixon *v.* Fawcus	3 E. & E. 537	195
Dobson *v.* Collis	1 H. & N. 81	3
Doe *d.* Pennington *v.* Taniere	12 Q. B. 998	17
Donellan *v.* Read	3 B. & Ad. 899	307
Drake *v.* Pickford	15 M. & W. 607	43, 44

E.

East Anglian Railway Company *v.* Eastern Counties Railway Company	11 C. B. 775	289
Eastern Counties Railway Company *v.* Broom	6 Ex. 314	312
Eastwood *v.* Kenyon	11 A. & E. 438	62
Eaton *v.* Boston and Lowell Railway Company	11 Allen R. 500	180, n.
Ecclesiastical Commissioners *v.* Merral	Law Rep. 4 Ex. 162	17, 18, 20
Elliott *v.* Royal Exchange Assurance Company	Law Rep. 2 Ex. 237	8, 9
Elsee *v.* Gatward	5 T. R. 143	339
Evans *v.* Carrington	2 D. F. & J. 481	40
—— *v.* Harlow	5 Q. B. 624	220, 223
—— *v.* Smallcombe	Law Rep. 3 H. L. C. 249, at p. 253	240, 253, 262, 267, 268, 269, 270, 287, 293

F.

Farrington *v.* Donohoe	Ir. Rep. 1 C. L. 675	3
Fawcett *v.* York and North Midland Railway Company	16 Q. B. 610	180
Fenner *v.* London and South Eastern Railway Company	Law Rep. 7 Q. B. 767	299, 300, 301, 302
Fergusson *v.* Fyffe	8 Cl. & F. 121	348
Fisher *v.* Liverpool Marine Insurance Company	Law Rep. 8 Q. B. 469; affirmed Law Rep. 9 Q. B. 418	194
Fishmongers' Company *v.* Robertson	5 M. & G. 131	17, 20

		PAGE
Fletcher *v.* Ashburner	1 Wh. & T. L. C. (4th ed.) p. 826	31
——— *v.* Rylands	Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330	64, 65, 66, 67, 178, 183
Flowers *v.* Welch	9 Ex. 272	44
Forbes *v.* Steven	Law Rep. 10 Eq. at p. 191	32, 33, 34
Forward *v.* Pittard	1 T. R. 27, at p. 33	340
Fouldes *v.* Willoughby	8 M. & W. 540, at p. 549	87, 88
Fountaine *v.* Carmarthen Railway Company	Law Rep. 5 Eq. 316	253
Fowler *v.* Hollins	Law Rep. 7 Q. B. 616, at p. 639	87, 88
Fryer *v.* Johnson	2 Wils. 28	216
—— *v.* Kinnersley	15 C. B. (N.S.) 422	81

G.

General Steam Navigation Company *v.* Guillou	11 M. & W. 877	348
Gibson *v.* East India Company	5 Bing. N. C. 262	62
Gill *v.* Continental Union Gas Company	Law Rep. 7 Ex. 332, at p. 337	194
Godard *v.* Gray	Law Rep. 6 Q. B. 139	348
Gordon *v.* Harper	7 T. R. 9	55
Goslin *v.* Clark	12 C. B. (N.S.) 681	40
Grainger *v.* Hill	4 Bing. N. C. 212	123
Great Western Railway Company *v.* Rimell	18 C. B. 575	95
Green *v.* General Omnibus Company	7 C. B. (N.S.) 290	313
Gresham Life Assurance Society, In re	Law Rep. 8 Ch. 446, per Mellish, L.J., at p. 451	153

H.

Hammersmith Rent Charge, In re	4 Ex. 87, at p. 97	195, 196
Harman *v.* Delany	2 Str. 898	220
——— *v.* Tappenden	1 East, 555	312, 321
Harrison *v.* Bush	5 E. & B. 344	81, 82, 84
Heugh *v.* London and North Western Railway Company	Law Rep. 5 Ex. 51	88, 90
Heywood *v.* Collinge	9 A. & E. 268	123
Hill *v.* New River Company	9 B. & S. 303	180, 183
Hills *v.* Sughrue	15 M. & W. 253	171
Holmes *v.* Powell	8 D. M. & G. 572	105
Houldsworth *v.* Evans	Law Rep. 3 H. L. C. 263, at p. 276	242, 262 267, 268, 286, 293, 294

I.

Imperial Bank of China *v.* Bank of Hindustan	Law Rep. 6 Eq. 91	251
Ingate *v.* Christie	3 C. & K. 61	343
Innes *v.* Wylie	1 C. & K. 257	202

J.

		PAGE
Jee *v.* Thurlow	2 B. & C. 547	39
Jessopp *v.* Watson	1 My. & K. 665	31, 32
Judson *v.* Etheridge	1 C. & M. 743	134

K.

Keane *v.* Reynolds	2 E. & B. 748	313, 318, 327
King *v.* Jones	5 Taunt. 418; 4 M. & S. 188	105, 117, 118
Kingdon *v.* Nottle	1 M. & S. 355; 4 M. & S. 53	105, 111, 117

L.

Laird *v.* Birkenhead Railway Company	29 L. L. (Ch.) 218	253
Lane's Case	33 L. J. (Ch.) 84	253
Laveroni *v.* Drury	8 Ex. 166	339
Lee *v.* Riley	18 C. B. (N.S.) 722	179
Levett *v.* Withrington	1 Lutw. 317	105
Locke *v.* Darley	2 Dr. & W. 256	188
Ludlow (Mayor of) *v.* Charlton	6 M. & W. at p. 823	24
Lyon *v.* Mells	5 East, 428	342, 343

M.

Macgregor *v.* Dover and Deal Railway Company	18 Q. B. 618	251
Machu *v.* South Western Railway Company	2 Ex. 415	95
Maidman *v.* Malpas	1 Hagg. Const. 208	216, 217
Malachy *v.* Soper	3 Bing. N. C. 371, at p. 383	220, 223
Malden *v.* Great Northern Railway Company	Law Rep. 9 Ex. 300	298
Manchester, Sheffield, and Lincolnshire Railway Company *v.* Wallis	14 C. B. 213	180
Marshall *v.* Bishop of Exeter	Law Rep. 3 H. L. 17	154
Matson *v.* Swift	8 Beav. 368	32, 34
Maund *v.* Monmouthshire and Stafford-shire Canal Company	2 Dowl. (N.S.) 113	312, 323
May *v.* Burdett	9 Q. B. 101	178
McLean *v.* McKay	Law Rep. 5 P. C. 327	189
Mears *v.* London & South Western Railway Company	11 C. B. (N.S.) 850	55
Meeus *v.* Thellusson	8 Ex. 638	348
Metcalfe *v.* London, Brighton, and South Coast Railway Company	4 C. B. (N.S.) 307	95, 97
Milan, The	Lush. 388	180
Milgate *v.* Kebble	3 M. & G. 100	55
Miller *v.* David	Law Rep. 9 C. P. 118	221

		PAGE
M'Kean *v.* M'Ivor	Law Rep. 6 Ex. 36	88
Morland *v.* Pellatt	8 B. & C. 722	148
Morris *v.* Edgington	3 Taunt. 24	105
Morse *v.* Slue	1 Vent. 190, 238	340, 341

N.

New Brunswick and Canada Railway Company *v.* Conybeare	9 H. L. C. 711	348
Nicklin *v.* Williams	10 Ex. 259	106
Norway, The	Br. & Lush. 377	76
Norwich (Mayor of) *v.* Norfolk Railway Company	4 E. & B. 397	289
Notara *v.* Henderson	Law Rep. 7 Q. B. 225, at pp. 230, 235	138
Nowell *v.* Mayor of Worcester	9 Ex. 457	305, 306
Nunn *v.* Fabian	Law Rep. 1 Ch. 35	17

O.

Orchard *v.* Rackstraw	9 C. B. 698	134

P.

Palmer *v.* Bishop of Exeter	1 Str. 576	216, 217
Parker *v.* Taswell	2 De G. & J. 559	51, 52, 53
——— *v.* Whyte	1 H. & M. 167	188
Pearson, Ex parte	Law Rep. 8 Ch. 667, at p. 672	149
Perkins *v.* National Assurance and Investment Association	2 H. & E. 71	122, 123, 124
Perry's Executors *v.* Reg.	Law Rep. 4 Ex. 27	142
Phœnix Life Assurance Company, Re	2 J. & H. 229	251
Phosphate of Lime Company *v.* Green	Law Rep. 7 C. P. 43	232, 239, 245, 253, 262, 287, 293, 294
Pistor *v.* Cater	9 M. & W. 315	51
Poulton *v.* London and South Western Railway Company	Law Rep. 2 Q. B. 534	313, 318, 324
Prince of Wales Assurance Company *v.* Harding	E. B. & E. 182	252
Pulteney *v.* Darlington	1 Bro. C. C. 222	32

R.

Ramazotti *v.* Bowring	7 C. B. (N.S.) 851	253
Ramshay, Ex parte	18 Q. B. 173	195
Rayner, Ex parte	Law Rep. 7 Ch. 325	148
Read *v.* Edwards	17 C. B. (N.S.) 245	179

		PAGE
Reg. *v.* Archbishop of Canterbury	1 E. & E. 545	195
—— *v.* Eastern Archipelago Company	2 E. & B. 857	264, 265
Rex *v.* Cambridge University (Dr. Bentley's Case)	1 Str. 557	195
—— *v.* Mayor of Ripon	1 Ld. Raym. 563	322
—— *v.* Watson	2 T. R. 199	313, 317, 322
—— *v.* Windham	1 Cowp. 377	322
Reynolds *v.* Doyle	1 Man. & G. 753	105
Rich *v.* Bushnell	4 Hagg. Eccl. 164	216
—— Kneeland	Cro. Jac. 330	339
—— Pilkington	Carth. 171	322
Ricketts *v.* East and West India Docks, &c., Railway Company.	12 C. B. 160	180
Ritchie *v.* Atkinson	10 East, 295	76
Roach *v.* Wadham	6 East, 289	105, 113
Roberts *v.* Bury Commissioners	Law Rep. 4 C. P. 755; in error, Law Rep. 5 C. P. 310	171
Robinson *v.* Knights	Law Rep. 8 C. P. 465	76
Romney Marsh (Bailiffs of) *v.* Trinity House	Law Rep. 5 Ex. 204	179
Rooke's Case	5 Co. 99, 100	195
Roper *v.* Lendon	1 E. & E. 825	9
Royal British Bank *v.* Turquand	6 E. & B. 327	227, 229, 252, 293
Ruck *v.* Williams	3 H. & N. 308	66

S.

Sands *v.* Child	3 Lev. 351	313
Schibsby *v.* Westenholz	Law Rep. 6 Q. B. 155	348, 349, 354
Scott *v.* Avery	5 H. L. C. 811	9, 10, 11, 12
Scrivener *v.* Pask	Law Rep. 1 C. P. 715	171
Shaw *v.* Stenton	2 H. & N. 858	105
Sheppard *v.* Hong Kong and Shanghai Banking Corporation	20 W. R. 459	154, 155
Shipwick *v.* Blanchard	6 T. R. 299	87
Shrewsbury and Birmingham Railway Company *v.* North Western Railway Company	6 H. L. C. at p. 135	292
Simpson *v.* Heath	5 M. & W. 631	207
Singleton *v.* Eastern Counties Railway Company	7 C. B. (N.S.) 287	159
Smith *v.* Birmingham and Staffordshire Gaslight Company	1 A. & E. 526	312, 323
Smith *v.* Hopper	9 Q. B. 1005	313
—— *v.* Kenrick	7 C. B. 515	65, 66
—— *v.* London and South-Western Railway Company	Law Rep. 6 C. P. 14	179
Smith's Case	Law Rep. 4 Ch. 611	194
Sneesby *v.* Lancashire and Yorkshire Railway Company	Law Rep. 9 Q. B. 263	179
Soames *v.* Spencer	1 D. & R. 32	253, 260
Society of Practical Knowledge *v.* Abbott	2 Beav. 559	288
Souch *v.* Strawbridge	2 C. B. 808	3, 5, 6, 307, 308
South of Ireland Colliery Company *v.* Waddle	Law Rep. 4 C. P. 617	17

		PAGE
South Yorkshire Railway Company *v.* Great Northern Railway Company	9 Ex. 55, 84	264
Spackman *v.* Evans	Law Rep. 3 H. L. C. 171, at p. 191	239, 245, 262, 267, 268, 269, 270, 286, 287, 289, 293, 294
Spry *v.* Gallop	16 M. & W. 716	216
Stafford (Mayor of) *v.* Tilt	4 Bing. at p. 77	23
Staines *v.* Morris	1 V. & B. 8	188
Stapley *v.* London, Brighton, and South Coast Railway Company	Law Rep. 1 Ex. 21	158
Stephens *v.* Elwall	4 M. & S. 259	314
Stevens *v.* Jeacocke	11 Q. B. 731	127, 130
Stubley *v.* London and North-Western Railway Company	Law Rep. 1 Ex. 13	158
Sutton's Hospital	10 Co. 1	262, 292
Sweet *v.* Lee	3 M. & G. 452	3
—— *v.* Seager	2 C. B. (N.S.) 119	211, 213

T.

Taylor *v.* Chichester and Midhurst Railway Company	Law Rep. 2 Ex. 356	252, 264, 285, 289
—— Dulwich Hospital	1 P. Wms. 655	313, 317, 324
Tennent *v.* Earl of Glasgow	Court of Sessions Cases, 3rd series, 133	66
Thetford (Mayor of) Case	1 Salk. 192; 3 Salk. 103	21
Thomas *v.* Fredricks	10 Q. B. 775	308
Thompson *v.* Lapworth	Law Rep. 3 C. P. 149	211, 212, 213
—— —— *v.* Maberly	2 Camp. 573	58
Thorogood *v.* Bryan	8 C. B. 115	180, 182
Tidswell *v.* Whitworth	Law Rep. 2 C. P. 326	211, 212, 213
Toogood *v.* Spyring	1 C. M. & R. 181	81
Tooker *v.* Smith	1 H. & N. 732	51
Totterdell *v.* Fareham Blue Brick Company	Law Rep. 1 C. P. 674	227, 252
Tredwen *v.* Holman	1 H. & C. 72, at p. 79	8, 10
Tress *v.* Savage	4 E. & B. 36	51, 52
Tuff *v.* Warman	2 C. B. (N.S.) 740	180
Tulk *v.* Moxhay	2 Ph. 774	188

V.

Vallée *v.* Dumergue	4 Ex. 290	348, 352, 356

W.

Watter *v.* James	Law Rep. 6 Ex. 124	253
Wells *v.* Horton	4 Bing. 40, at p. 43	5, 6
Whiteley *v.* Adams	15 C. B. (N.S.) 392	81
Williamson *v.* Advocate-General	10 Cl. & F. 1	32, 33
Witham Navigation Company *v.* Padley	4 B. & Ad. 69	313

		PAGE
Wolveridge *v.* Steward	1 C. & M. 644, at p. 657	153
Wood *v.* Copper Miners' Company	14 C. B. 428; 17 C. B. 561	53
—— *v.* Tate	2 B. & P. (N.R.) 247	17, 19
Woolley *v.* North London Railway Company	Law Rep. 4 C. P. 602	299
Worsley *v.* Worsley	Law Rep. 1 P. & M. 648	40, 42
Wyckoff, In the Goods of	3 Sw. & Tr. 20	142, 143

Y.

Yarborough *v.* Bank of England	16 East, 6	312, 322
Yeoman *v.* Bradshaw	Holt (Ca. Temp.) 42	142
Young *v.* Macrae	3 B. & S. 264	218, 220, 222, 223

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXVII VICTORIA.

KNOWLMAN *v.* BLUETT.

1873
Nov. 10.

Statute of Frauds, s. 4—*Agreement not to be performed within a Year—Contract for the Support of Illegitimate Children—Annuity—Amendment of Claim.*

The defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her verbally to pay her 300*l.* per annum by equal quarterly instalments for so long as she should maintain and educate the children. At the time of the making of the promise the eldest child was about fourteen years old:—

Held, that this agreement was not one "not to be performed within a year from the making thereof," within the meaning of the Statute of Frauds, s. 4, and was therefore binding, though made by parol only.

Per Bramwell and Pigott, BB.:—the agreement was one which might at any time have been terminated by either party giving notice to the other.

The claim in a declaration may be amended, under the Common Law Procedure Act, 1852, s. 222, by the judge at the trial.

Affirmed in Ex. Ch. post 807

DECLARATION that the plaintiff, being sole and unmarried, was seduced by the defendant, by means whereof she became the mother of an illegitimate child; that she afterwards became the mother of six other illegitimate children by the defendant, and thereupon "in consideration of the premises and that the plaintiff would, at the request of the defendant, take, and continue to take the sole charge

1873

KNOWLMAN v. BLUETT.

of the said children, and supply them with such things as should be necessary for their care and nurture, and for their use and benefit, and educate, and find and provide for the education of the said children, the defendant promised the plaintiff that he would pay the plaintiff an annuity or sum of 300*l.* per annum for and during a term which has not yet expired," the said annuity to be paid in four equal quarterly payments on the usual quarter days "in each and every year during the term aforesaid;" that all conditions, &c. were fulfilled, yet the defendant discontinued the payment of the said sum, and two years arrears were due and unpaid. The claim was for 600*l.*

Plea (among others), denying the promise. Issue.

At the trial before Kelly, C.B., at the Devon Summer Assizes, 1873, it appeared that the defendant was the father of seven illegitimate children of the plaintiff born between the years 1851 and 1865, and, according to the plaintiff's evidence, at a conversation which took place at some period before the year 1866, when the plaintiff and defendant finally separated, the defendant said, "I shall merely give you sufficient to bring up the children properly. I will give you 300*l.* a year to keep the children." The plaintiff's brother stated that when the separation took place the defendant told him he would allow the plaintiff 300*l.* a year for the education and support of the children until he could afford to put down a sum of money; and in an unsigned letter written by the defendant to the plaintiff on the 18th of February, 1866, he wrote, "I have always told you I would give you 300*l.* per annum whilst I have it in my power, until I can give you a fixed sum which I am working hard to get matters settled so as to put it in my power to accomplish." The defendant paid several instalments of the annuity, but having become dissatisfied with the mode in which his children were being brought up, had, since Michaelmas, 1870, discontinued his payments, and the plaintiff now sought to recover two years and a half arrears. It was objected on behalf of the defendant that the promise established by this evidence should have been in writing, signed by the defendant, to satisfy the 4th section of the Statute of Frauds (29 Car. 2, c. 3), which enacts (among other things) that no action shall be brought to charge any person "upon any agreement, that is not to be performed within the space of

1873

KNOWLMAN v. BLUETT.

one year from the making thereof, unless the agreement or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The learned judge overruled the objection, and upon its appearing that at the time of action brought two and a half years of the annuity were in arrear, and not two years, for which alone the claim in the declaration was originally made, amended the claim from 600*l.* to 750*l.*, and directed a verdict for the plaintiff for the latter sum. Leave was reserved to move to enter a nonsuit, if the Court should be of opinion that there was no evidence to go to the jury in support of the promise, or to reduce the damages to 600*l.*, the amount originally claimed, if the Court should be of opinion that the claim could not be amended.

Cole, Q.C. (*Arthur Charles*, with him), moved accordingly. First, the contract proved was not in the contemplation of either party to be performed within the year; and that it was to extend beyond that period appears from its whole tenor. It must therefore be in writing.

[BRAMWELL, B. In *Souch* v. *Strawbridge* (1), it was held that a contract to maintain a child at the defendant's request for so long as the defendant should think proper, need not be in writing.]

That was an undertaking revocable at the defendant's pleasure. Here, having regard to the ages of the children, both parties must have contemplated a period beyond a year. The children were all young and for years would be unable to maintain themselves. In *Farrington* v. *Donohoe* (2), it was held that a parol promise to maintain a child, known to be about five years old, until able "to do for herself," was within the statute, although the child might die within the year. A contract for the payment of an annuity for life must be in writing, though it may determine within the year by the death of the annuitant: *Sweet* v. *Lee*. (3) In *Dobson* v. *Collis* (4), a verbal contract of service for more than one year, though determinable by either party within the year by a three months' notice, was held to be invalid, and

(1) 2 C. B. 808; 15 L. J. (C. P.) 170.
(2) Ir. Rep. 1 C. L. 675.
(3) 3 M. & G. 452.
(4) 1 H. & N. 81; 25 L. J. (Ex.) 267.

1873

KNOWLMAN v. BLUETT.

Post 566

Pollock, C.B., says in his judgment (1), "In my opinion this contract is not the less within the statute, because it is liable to be defeated within the year." There is no distinction between the case of a contract defeasible by the act of the parties and by death. Secondly, as to the reduction of damages, the judge had no power to amend the claim. Sect. 222 of the Common Law Procedure Act, 1852, does not apply. An amendment of the claim is not a "defect or error" within the meaning of that section.

BRAMWELL, B. I am of opinion that this rule should be refused. A promise of some sort, it is admitted, was made by the defendant, and the first question is what that promise was. It appears to me that it was a promise to pay the plaintiff at the rate of 300*l.* per annum, payable quarterly, so long as she should maintain the defendant's children. The sum may be called an "annuity," but really the engagement was one not binding on either party for any definite space of time. The defendant might, in my opinion, have said to the plaintiff at the end of any particular quarter—I will not say without, perhaps, giving a reasonable notice—"I shall no longer contribute to or provide for the maintenance of the children. I shall maintain them no longer." It seems to me impossible to hold that the defendant was bound for an indefinite time, and that so long as the children remained with the plaintiff, no matter what their ages or position might be, he was to be liable to pay this sum of 300*l.* every year. I cannot think that if, for example, he had become a poor man, or if the children had become able to maintain and were maintaining themselves, he would not have been at liberty to withdraw from his engagement. Again, the contract, if binding upon him for all time, would also be binding upon the plaintiff. But I cannot conceive for a moment, upon the case before us, that the plaintiff was bound to continue to maintain and educate the children for any definite period. At any time she might have declined to continue to do so; and on the other hand the defendant at any time would have been at liberty to terminate his liability.

If, then, this be the correct view of the promise proved at the trial, it is manifest that it is not within the Statute of Frauds, s. 4. It might have been performed within the year, although, no doubt,

(1) 25 L. J. (Ex.) at p. 268.

both parties expected it would last longer than the year, and upon this ground alone I think the rule should be refused.

But, further, I think that the plaintiff could have recovered if the declaration had contained a count alleging that at the defendant's request she had maintained these children upon the terms that he should pay her at the rate of 300*l.* a year. In *Souch* v. *Strawbridge* (1), Tindal, C.J., expressed an opinion that the Statute of Frauds did not apply to an executed consideration. The other judges in that case neither assented to nor dissented from that proposition, and I do not desire to raise a discussion upon it now. I think that, whether it be law or not, the plaintiff here might have succeeded, in the view which I take of the evidence, upon such a count as I have suggested. This reduces the question before us to one of pleading. Upon the general question of the defendant's liability I have intimated my opinion that he is at liberty to withdraw from his obligation if he think fit, either at the end of any quarter or upon a reasonable notice; but as far as this action is concerned he is, in my judgment, liable to the plaintiff.

As to the amendment, I think my Lord was right in making it. The 222nd section of the Common Law Procedure Act does not deal with questions of variance only, but enables a judge to make any amendment necessary for determining the real controversy between the parties. I am of opinion that a claim may be amended under the terms of this section, which was purposely framed by the late Mr. Justice Willes and myself in the most comprehensive words which could be used.

PIGOTT, B. I am of the same opinion. The effect of the contract has been, I think, rightly stated by my Brother Bramwell. No time is fixed during which the defendant's undertaking is to continue, and, that being so, the language used by Best, C.J., in *Wells* v. *Horton* (2) is applicable. "The plain meaning of the words (of the statute)," he says, "is confined to contracts which are not to be carried into execution within the year, and does not extend to such as may by circumstances be postponed beyond that period; otherwise there is no contract which might not fall within the statute." And it seems to me the necessary consequence of

(1) 2 C. B. 808; 15 L. J. (C. P.) 170. (2) 4 Bing. 40, at p. 43.

1873

KNOWLMAN v. BLUETT.

this interpretation of the contract is that it is competent to either party to put an end to it at any time. For instance, if the defendant had become straitened in circumstances, or desirous of maintaining his children in some other manner than by paying the plaintiff for their maintenance, he might have said, "I will no longer go on on the old footing; I will pay the annuity no longer;" and on the other hand the plaintiff might at any moment have declined to continue to keep the children.

There remains the question of the amendment, as to which I agree with what has been said. I think it clear that under the 222nd section of the Common Law Procedure Act, 1852, my Lord had power to amend the claim.

KELLY, C.B. I retain the opinion upon this case which I entertained at the trial, and think there should be no rule. I forbear to pronounce any opinion as to whether it was competent to either party to determine this contract at his or her pleasure. The contract proved was a contract to pay the plaintiff 75*l.* a quarter so long as she should maintain the children, of which the defendant was the father. The declaration speaks of the sum to be paid as an "annuity," and in one sense it may be called an annuity. But it is not necessarily to be paid annually, nor is it necessarily to continue for an entire year, still less for a number of years. The engagement is to pay the plaintiff at the rate of 300*l.* a year so long as the plaintiff should perform the condition upon which the payment was to be made. Under these circumstances the language of Best, C.J., in *Wells* v. *Horton* (1), and the decision of the Court of Common Pleas, in *Souch* v. *Strawbridge* (2), seem to me to be in point and to govern this case.

With regard to the amendment, I am clearly of opinion that I had power to make it. It was necessary for the determination of the real question in controversy, and strictly within the words of the 222nd section of the Common Law Procedure Act, 1852, to which my Brother Bramwell has referred.

Rule refused.

Attorneys for defendant: *Wedlake & Letts, for R. G. Edmonds, Plymouth.*

(1) 4 Bing. 40, at p. 43. (2) 2 C. B. 808; 15 L. J. (C. P.) 170.

DAWSON AND OTHERS *v.* LORD OTHO FITZGERALD. 1873 *Nov.* 22.

Landlord and Tenant—Agreement to pay Compensation for Damage from Ground Game — "Fair and Reasonable Compensation" — Arbitration Clause.

The defendant agreed with the plaintiffs, his landlords, that he would keep upon the premises demised such a number only of hares and rabbits as would do no injury to the trees or plantations of the plaintiffs, or their growing crops, or the growing crops of their tenants, and in case he should keep such a number as should do injury, would pay the plaintiffs a fair and reasonable compensation. In an action brought for breach of this agreement, the defendant pleaded that "one of the terms of the tenancy was that, in case of any such injury, the defendant would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators or an umpire; that a difference arose, and that no arbitrators or umpire were appointed, and no award made." On demurrer:—

Held, a good plea.

Reversed on appeal 18 L.P. 257 C.P.

DECLARATION, that the plaintiffs demised to the defendant a messuage and lands called West Park, with liberty of shooting, hunting, &c., over certain manors upon the terms, amongst others, that the defendant would during his tenancy keep, or cause to be kept and encouraged, such a number only of hares and rabbits upon the said manors as would do no injury to the trees, woods, underwoods, and plantations belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers; and that in case the defendant should keep, or cause to be kept or encouraged, such a number of hares and rabbits upon the said manors as should injure the trees, &c., belonging to the plaintiffs, or their growing crops, or the growing crops of any of their tenants or farmers, the defendant should and would pay the plaintiffs, or their tenants or farmers, a fair and reasonable compensation for such injury; that all conditions, &c., were fulfilled, yet the defendant did not during his tenancy keep, or cause to be kept or encouraged, such a number only of hares and rabbits upon the said manors as would do no injury to the trees, &c., belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers, but kept such a number as did great injury to such trees, &c., and although frequently requested so to do, would not pay to the plaintiffs, or to their tenants or farmers, or

1873

DAWSON v. FITZGERALD.

any of them, a fair and reasonable, or any, compensation for such injury.

Plea: That one of the terms of the said tenancy was, that in case any such injury should be done by the defendant, he would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, the said arbitrators, when chosen, to agree upon and nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the plaintiffs and the defendant; that a difference arose as to the amount of compensation, and that no arbitrators have been appointed, nor any award made.

Demurrer and joinder.

Nov. 19. *Kingdon, Q.C.* (*Arthur Charles* with him), in support of the demurrer. The arbitration clause is collateral, and is not pleadable in bar to an action on the agreement to encourage only such a number of hares and rabbits as would do no injury, or else to pay a "fair and reasonable" compensation. If an arbitration be a condition precedent to bringing the action, no effect is given to the word "reasonable," and the defendant would be bound to pay whatever was awarded, reasonable or not. A cause of action accrued upon the occurrence of the injury. The defendant agreed, without qualification, only to encourage so many hares and rabbits as would do no injury. Suppose the arbitration clause had been in a different instrument, or in a different part of the same instrument, it could not have been contended that it was pleadable in bar, and it can make no difference that it follows immediately after the words binding the defendant either to do no injury or to pay compensation. The case falls within the principle recognised by all the judges in *Elliott* v. *Royal Exchange Assurance Company* (1), and expressed by Bramwell, B., in *Tredwen* v. *Holman* (2), in these words:—"If a tenant covenants that he will cultivate the demised premises in a husband-like manner, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitra-

(1) Law Rep. 2 Ex. 237.
(2) 1 H. & C. 72, at p. 79; 31 L. J. (Ex.) 398.

tion, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will arise until he has ascertained them." In this case there is an absolute covenant.

It may be said that both parties intended arbitration in case of dispute. If that be so, and a judge at chambers deems it a proper case for a stay of proceedings under the Common Law Procedure Act, 1854, s. 11, the defendant can compel a reference, but an arbitration clause cannot oust the jurisdiction of the courts (see Co. Litt. 536); and in considering whether it is pleadable the intention of the parties is not to be considered unless it is clearly expressed, as in *Scott* v. *Avery* (1), that the reference is to be a condition precedent to the liability to pay. In *Roper* v. *Lendon* (2) a similar stipulation to the present was held no bar.

R. E. Turner (*Sir J. B. Karslake, Q.C.*, with him), contrà. The question is one of construction. It may be conceded that whatever the parties intend they cannot oust the jurisdiction of the courts by an arbitration clause; but they can enter into an agreement under which no liability arises until an arbitration takes place. In *Scott* v. *Avery* (1) the parties expressly stipulated to this effect, and in this case the agreement, properly construed, is that the defendant will only pay whatever upon an arbitration is certified to be a fair and reasonable compensation. The arbitrators are made the judges of what is reasonable, and no liability to pay arises until they have assessed the amount. *Elliott* v. *Royal Exchange Assurance Company* (3) is an authority for the defendant, the majority of the Court holding that the arbitration clause there was a bar. Again, the plea is good as an argumentative traverse of the agreement alleged in the declaration.

Kingdon, Q.C., in reply.

Cur. adv. vult.

Nov. 22. KELLY, C.B. I think the defendant is entitled to the judgment of the Court; and except for certain expressions of judicial opinion, founded upon the dictum of Lord Coke, which has been referred to, I should have deemed the point a clear one. The covenant, or rather agreement, declared upon is contained in a

(1) 5 H. L. C. 811. (2) 1 E. & E. 825; 28 L. J. (Q. B.) 260.
(3) Law Rep. 2 Ex. 237.

1873

DAWSON v. FITZGERALD.

single sentence, and by it the parties have, in my opinion, bound themselves to put arbitrators in the place of a jury in case of a dispute, and to leave it to them to say what is a "fair and reasonable" compensation.

The ground of the argument for the plaintiff is, that the effect of holding this clause a bar will be to oust the jurisdiction of the courts of law, and the high authority of Lord Coke is relied on as shewing that the courts cannot by agreement be deprived of their jurisdiction. Now unquestionably that was the law at one time, and I lament that it should have been so, for it certainly seems to me highly inconvenient that an agreement to pay damages, and at the same time an agreement to refer to arbitration what those damages should be, should be held to be collateral agreements, so that at one and the same moment two actions might be proceeding, the one for breach of the agreement to pay, and the other for breach of the agreement to refer, in each of which the damages recovered might be different. However, where the two agreements were contained in different instruments, or in different parts of the same instrument, that inconvenience did arise. But here I do not think it does; for the agreement alleged on this record is one and indivisible to pay what may be awarded, and until an award has been made, I do not think there is any liability. It is suggested that there are no negative words in this case, as in *Scott* v. *Avery* (1); but I do not think it necessary that there should be any where by clear implication the arbitration and award are a condition precedent to liability.

4 Q.B.D. 584
9 Q.B.D. 27

BRAMWELL, B. There is, or ought to be, no doubt as to the principle upon which we ought to decide this case; and, if I may say so, I cannot state it more concisely than in the words which I used in *Tredwen* v. *Holman* (2), and to which Mr. Kingdon has referred. If there be a covenant to pay in a certain event, and a separate and collateral covenant that in case of difference that difference shall be referred to arbitration, the two are distinct from each other, and one may be broken whether the other be broken or not; and it is no matter whether the two covenants are in different deeds, or in the same deed at different parts of it,

(1) 5 H. L. C. 811. (2) 1 H. & C. 72, at p. 79; 31 L. J. (Ex.) 398.

W 585.

or following each other consecutively. If, on the other hand, there is only a covenant to pay whatever upon arbitration shall be found to be due, then no action can be maintained until the arbitration has taken place. Now for a long series of years it has been held, and, as I venture to think, properly and reasonably, that a collateral agreement to refer shall be no answer to an action upon an independent covenant to pay money; nor did the decision in *Scott* v. *Avery* (1) at all interfere with the law as it then stood. I can conceive many cases where it would be very unjust to allow a defendant to defeat an action for breach of covenant by setting up an arbitration clause in bar. He might thus be enabled, when perhaps the matter really in dispute was a small one, to delay its settlement for a long time, and succeed in entangling a plaintiff in a long and expensive arbitration. There was, in my opinion, nothing unreasonable in a law which said, and says, that this should not be done, but that the defendant should be left to get what damages he could—they might be nominal—for the breach of the agreement to refer. And now, at any rate, the defendant does not suffer any hardship, nor is the intention of the parties defeated; for if he chooses to apply to a judge, and if the judge thinks the case a proper one for arbitration, an order to stay proceedings would be made under the Common Law Procedure Act, 1854, s. 11. But it is by no means a matter of course to stay proceedings under that section, and I have myself sometimes refused to do so where it has seemed to me that the arbitration is only being sought for to cause the plaintiff needless expense and trouble.

With regard to this particular plea, I think it bad, for two reasons. First, I think there is a separate covenant or agreement by the defendant to encourage only so many hares and rabbits as would do no injury, and that he has committed a breach by keeping more. That is a separate cause of action in my opinion, and one in respect of which, supposing the act were done wilfully, vindictive damages might very possibly be given. Then the agreement goes on to provide, that in case the defendant should keep such a number as should injure the trees, &c., of the plaintiffs, or their growing crops, or the growing crops of their tenants or farmers, he should pay a "fair and reasonable" compensation. It

(1) 5 H. L. C. 811.

1873

DAWSON v. FITZGERALD.

may be said, therefore, that the defendant's agreement is not that he will not keep an excessive number of hares and rabbits, but that if he does he will pay compensation; but even assuming this to be the true construction of it, how is the plea an answer to the breach? Mr. Turner, who argued the case with his usual clearness, says that the plea is really good as a traverse of the agreement; in other words, that the promise in the declaration is not properly stated, and if his view of the agreement is correct, he is right. But what does the agreement mean? If it were simply that the defendant was to pay such damages as might be fixed by arbitration, then the plea is good. But it is not so. The agreement is, that in case of injury a "fair and reasonable" compensation is to be paid; yet, if the defendant is right, the payment of a reasonable sum would be no answer to the action, because the plaintiffs might say, "We never promised to take a reasonable sum, but only whatever the arbitrators, in case of difference, might find to be a proper compensation."

My own opinion, therefore, is that the plaintiffs are entitled to judgment, first, because I think there is an absolute agreement not to encourage hares and rabbits in such numbers as to cause injury; and, secondly, because I think there is an absolute agreement to pay what is fair and reasonable, with a collateral agreement that if the parties differ there shall be a reference. The only effect of this collateral agreement is to give the defendant a right to apply for a stay of proceedings under the Common Law Procedure Act, 1854, s. 11. But although this is my opinion, as my Lord and my Brother Pigott take a different view of the agreement, I do not desire formally to dissent from their judgments.

PIGOTT, B. I agree with my Lord that the defendant is entitled to judgment. The doctrine that parties cannot agree to oust the jurisdiction of the courts must be taken with the modifications created by recent decisions, of which *Scott* v. *Avery* (1) is the principal. In each case I think we ought to consider what is the real intention of the parties as disclosed upon the face of the agreement; and reading this record I come to the conclusion that the real agreement was, that in case of injury occurring from over-encouragement of ground game, the defendant should pay what-

(1) 5 H. L. C. 811.

ever the arbitrators should fix, and that that sum should be regarded between the parties as a fair and reasonable compensation. In other words, he promised to pay what they, and not what a jury, should think fair and reasonable.

Judgment for the defendant.

Attorney for plaintiffs: *P. A. Hanrott.*
Attorneys for defendant: *Markby, White, & Burra.*

THE MAYOR, ALDERMEN, AND BURGESSES OF KIDDERMINSTER *v.* HARDWICK.

Nov. 14.

Corporation—Common Seal—Mutuality—Executory Contract—Part Performance—Ratification.

The plaintiffs, a municipal corporation and local board, on the 17th of July, caused certain tolls to be put up for letting by auction, under conditions by which the purchaser was immediately on the fall of the hammer to pay a month's rent in advance, and to produce two sureties, who were forthwith to sign the conditions and a draft lease.

The defendant was the highest bidder at the auction, and was declared the purchaser, and he paid a month's rent in advance, and signed an agreement to become lessee indorsed on the conditions; but he did not then, nor at any subsequent time, produce two sureties; and the plaintiffs ultimately, in pursuance of the conditions, determined the contract and sold the tolls at a loss.

The contract was not executed by the plaintiffs under their common seal, nor signed on their behalf by any person authorized under seal to do so. After the sale, the plaintiffs, on the 7th of August, by resolution, which was entered on the minutes under seal, adopted the report of a committee, to the effect that the tolls had been put up to auction, and that the defendant had become the purchaser at a rent of 350*l.* and had paid a deposit of 29*l.* 3*s.* 4*d.* Before this, however, the defendant had, on the 4th of August, written to the plaintiffs saying that he could not carry out his contract, and asking for a return of the sum paid.

In an action brought against the defendant to recover damages for the breach of his agreement to take the tolls:—

Held, that the contract was one that required to be made under the plaintiffs' common seal; that not having been sealed by the plaintiffs, nor signed by any person authorized under seal by them to do so, the defendant was not bound by it; that the payment of a month's rent in advance was not such a part performance as would have bound the plaintiffs in equity specifically to perform their agreement; and that the resolution of the 7th of August (even assuming it to be a ratification under seal of the contract) came too late.

ACTION against the defendant for refusing to take a lease of certain tolls according to his agreement with the plaintiffs.

1873

MAYOR OF KIDDERMINSTER v. HARDWICK.

Plea, amongst others, denying the agreement.

At the trial of the cause before Honyman, J., at the Worcester Spring Assizes, 1873, the following facts were proved:—

The plaintiffs had adopted the Public Health Act, 1849 (11 & 12 Vict. c. 63), and the Local Government Act, 1858 (21 & 22 Vict. c. 98), the corporation being (under s. 12 of the former, and ss. 12, 24 of the latter Act) the local board. Acting under the powers contained in s. 50 of the Local Government Act, 1858, and the sections of the Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), thereby incorporated, the plaintiffs had erected a market, and duly published a list of tolls. The market was opened early in the year 1872, and the plaintiffs had hitherto taken the tolls themselves by a collector.

On the 17th of July, 1872, the markets committee (see 5 & 6 Wm. 4, c. 76, s. 70) made a report to the town council, recommending that Messrs. Downton & Son should be directed to offer for sale by auction "the tolls of the cattle and vegetable markets and weighing machine," and this report was adopted by the town council by resolution, which was entered on the minutes and sealed with the common seal. (1)

On the 18th of July, premises described in the particulars of sale as "the cattle and wholesale vegetable markets and weighing machine, situate at Caldwall, in the borough of Kidderminster aforesaid, the property of the corporation, and the tolls arising from the same," were accordingly put up to auction by Messrs. Downton & Sons, under conditions which were (so far as is material) to the following effect: 1. The highest bidder was to be the purchaser or renter of the tolls for one year from the 18th of July, with the option of extending the time for two years by giving the lessors three months' notice previous to the 18th of July, 1873; 2. A lease was to be granted by the lessors on or before the 17th of August, at the expense of the lessee, who was thereupon to be let into possession and receipt of the rents, dues, and profits from that time; 3. The rent was to be payable monthly, in advance, the first payment to be made to the clerk of the lessors, or the auctioneer, immediately on the fall of the hammer, and on the lessee failing to make any such monthly payment, or to perform

(1) It did not appear when this entry was made and the seal affixed.

the conditions, the rent already paid was to be absolutely forfeited to the lessors, and the lease so to be granted, or the present letting, was to be void at their option, and they were to be at liberty to enter into immediate receipt of the rents then due or to become due, or relet the same premises, or any part thereof, to any other tenant, and all losses, costs, damages, and expenses attending the non-performance of the conditions, or otherwise in relation thereto, or to any such second letting, were to be made good by the defaulter; 10. The lessee was on the fall of the hammer to produce two sureties (to be approved of by the lessors or their clerk) for the due payment of the rent and performance of the covenants to be reserved and contained in the lease, who should forthwith sign the conditions and the lease, a draft of which had been prepared by the town clerk and approved by the lessors.

The defendant was the highest bidder, and the tolls were knocked down to him at the rent of 350*l.*, and he thereupon paid a month's rent and signed the following memorandum at the foot of the conditions:—

"I, the undersigned James Morton, do hereby, as agent for and on behalf of the Local Board of the Borough of Kidderminster, acknowledge that Thomas Hardwick has this day been declared the highest bidder for, and accordingly the farmer or renter of, the premises mentioned in the particulars hereunto annexed, and the tolls arising therefrom, at the yearly rent of 350*l.*, and that he has paid into my hands 29*l.* 3*s.* 4*d.*, as and for one month's rent in advance; and I hereby undertake that the said local board shall, on their part, fulfil the above-written conditions; and I, the said Thomas Hardwick, do hereby acknowledge that I am the farmer or renter of the same at the said yearly rent of 350*l.*, and I hereby agree to execute a lease containing the above and all other usual stipulations, and in all other respects on my part to fulfil the above-written contract; and we —— and —— hereby agree to become securities for the said Thomas Hardwick for the due performance by him of the foregoing conditions and stipulations to be contained in the said lease, which we also agree to execute when prepared. As witness our hands this 18th day of July, 1872." (1)

(1) It did not clearly appear whether this memorandum was signed by the town clerk.

1873

MAYOR OF KIDDERMINSTER v. HARDWICK.

No memorandum of the sale or letting was signed by the auctioneer.

The defendant did not produce his sureties according to the conditions; some time was given him by the town clerk for the purpose of doing so, but he failed to obtain any sureties; and on the 4th of August he wrote to the town clerk, saying that he was unable to do so, and withdrawing from the contract, and asking for a return of the rent already paid.

Previously to this the keys of the market had been handed to the defendant by the person in charge of the market; but this had been done in error, and contrary to the directions of the town clerk; and it did not appear that actual possession of the premises had been taken, or any tolls received, by the defendant, who afterwards returned the keys.

On the 7th of August the markets' committee reported to the town council that "they had caused the tolls to be offered by public auction on the 18th July, when Mr. Thomas Hardwick became the purchaser for one year, with liberty to extend the time to three years upon notice, at the annual rent of 350*l.*, and paid a deposit of 29*l.* 3*s.* 4*d.*, which amount had been paid to the treasurer;" and this report was "adopted" by the council, and was entered on the minutes under seal.

Afterwards, the defendant having failed to produce his sureties, the plaintiffs determined the letting, and relet the tolls by auction to another person at a rent of 250*l.*; and they now sought to recover from the defendant the difference and the costs of the resale.

At the trial it was objected for the defendant that the contract was one which required the seal of the plaintiffs; that it was not so sealed, and that the defendant was therefore not bound. The learned judge left the question of damages to the jury (who found a verdict for the plaintiffs for 45*l.*), and reserved leave to the defendant to move to enter a nonsuit or a verdict for him.

A rule having been obtained accordingly,

R. V. Williams (*J. O. Griffits*, with him), shewed cause. Although the auctioneer was authorized by the resolution of the 17th of July, which was under seal, to sell the tolls, it must be admitted that the

only contract signed was that signed by the town clerk, and not by the auctioneer. But immediately after the auction a month's rent was paid by the defendant to the town clerk, and that sum was afterwards paid over to the treasurer of the plaintiffs, and accepted and retained by them. This, coupled with the delivery of the keys, or even alone, constituted a part performance, which would have entitled the defendant to maintain a suit for specific performance against the plaintiffs: *Nunn* v. *Fabian* (1): and that being so, the objection of the want of mutuality is removed, and the defendant, who had signed an agreement to take the tolls, is bound: *Ecclesiastical Commissioners* v. *Merral* (2): *Wood* v. *Tate* (3); *Doe* d. *Pennington* v. *Taniere.* (4)

[POLLOCK, B. In all these cases there was an executed consideration, of which the party contracting with the corporation had taken the benefit. Here the defendant has never had possession.]

It is laid down in *Ecclesiastical Commissioners* v. *Merral* (2) that it is enough if the corporation are equitably bound; and here the plaintiffs were bound by accepting the month's rent in advance.

[POLLOCK, B. How could the defendant have claimed specific performance, when he was never ready to produce his sureties? He might perhaps have had a right to recover back the money paid, but he could not have enforced the contract as against the corporation.

PIGOTT, B., referred to *Fishmongers' Company* v. *Robertson.* (5)]

If the defendant was not bound prior to the 7th of August he at least became bound then, for the corporation then ratified the contract by their resolution under seal. It may further be contended that the corporation, who are here acting as a local board, with power to erect markets and levy tolls, could contract without seal to let the tolls, this being one of the purposes for which they are established: *South of Ireland Colliery Company* v. *Waddle.* (6)

Anstie and *Mackey*, for the defendant, were not called on to support the rule.

KELLY, C.B. I think this rule should be made absolute, on the

(1) Law Rep. 1 Ch. 35. (4) 12 Q. B. 998.
(2) Law Rep. 4 Ex. 162. (5) 5 M. & G. 131.
(3) 2 B. & P. (N. R.) 247. (6) Law Rep. 4 C. P. 617.

1873

MAYOR OF KIDDERMINSTER v. HARDWICK.

ground that there being no contract under the seal of the corporation, there was no mutuality, and that the plaintiffs cannot therefore maintain this action against the defendant. [After stating the facts of the case the learned judge proceeded:—]

The only defence to the action which we are now called upon to consider is, that there was no agreement under the seal of the corporation, and therefore no mutuality. In answer to this it is contended that the auctioneer was authorized under seal to put the tolls up to auction; but the contract was not signed by Downton & Sons, the persons named in the resolution, but, if by any one, only by the town clerk, who is an agent of the corporation for many purposes, but who had no authority to sign this contract unless expressly authorized under seal to do so. The corporation, therefore, was not bound.

But it is argued that, although there was no contract under seal, yet there was a part performance by the defendant; that it was, therefore, competent to the defendant, by filing a bill in equity, to enforce the performance of the contract by the plaintiffs, and then, on the authority of *Ecclesiastical Commissioners* v. *Merral* (1), it is contended that this gave a corresponding right to the plaintiffs to maintain the present action. I will observe at once that if it had appeared in the present case, as in that case, that the contract had been performed and carried into effect by both parties, and that the plaintiffs had had the benefit of that performance, the defendant would no doubt have been entitled to file his bill for specific performance. But the case just referred to, and all the other cases that have been cited, are cases where there has been an actual and de facto performance of the contract by one party of which the other party has taken, received, and enjoyed the benefit. And with respect to the case of *Ecclesiastical Commissioners* v. *Merral* (1), it must be observed, further, that it does not appear that the contract was treated as a binding contract for three years; it was not held that a tenancy for three years had been created; but as the corporation had handed over possession to the tenant, who had taken and retained it, and as the tenant had paid rent to the corporation, who had received it, it was held that there was a tenancy from year to year. It is further observed, in that

(1) Law Rep. 4 Ex. 162.

case, by way of a *semble*, by Kelly, C.B., that "when an individual contracts with a corporation in such a manner that the contract, though not under seal, may be enforced in equity against them, the individual is bound at law by any stipulation by him, which is made in consideration of the liability so imposed upon them." And here, if there had been any part performance, of which the plaintiffs had taken the benefit, that might have entitled the defendant to file his bill, and so the plaintiffs might have maintained the action. But let us see what is alleged as part performance. The conditions provided that, on the tolls being knocked down to the highest bidder, he should pay a month's rent in advance, and produce sureties, who should sign the lease. The defendant did pay a month's rent in advance, but he was not prepared with his sureties. Now the time to be looked at is the time of the alleged breach, and that time followed immediately on the knocking down of the tolls to the defendant. The question then is, whether at that time there was any part performance which would have entitled the defendant to maintain a bill for specific performance? There was nothing until he should have performed the stipulation as to producing his sureties; and though the matter remained in fieri for some time, still the breach, if any, was committed at the time of the knocking down, and was a continuing breach until the time expired for which indulgence had been granted, and when the final non-performance on the defendant's part took place. The question then is whether, during this time, it was competent to the defendant to file his bill. Clearly it was not so; the payment was merely conditional and provisional, and the breach was finally made when the sureties were not, after the delay, brought forward. The defendant therefore was not, at the time of the alleged breach, nor at any time before the alleged contract was finally broken, in a condition to enforce specific performance.

Let us now look at *Wood* v. *Tate*. (1) There a corporation had made a demise for twenty-one years, which was not under the common seal, but under which the tenant had been let into possession and had paid rent; and the action was brought for a distress put in to recover arrears of rent, the plaintiffs denying the exist-

(1) 2 B. & P. (N. R.) 247.

1873

MAYOR OF KIDDERMINSTER v. HARDWICK.

ence of a tenancy. Substantially, the question was the same as in *Ecclesiastical Commissioners* v. *Merral* (1), and it was held, and properly held, that there had been a part performance of which the corporation had taken the benefit, and on that ground it was held that a tenancy had been created. That case is therefore no authority for the plaintiffs.

But a more serious doubt has been raised in my mind by the case of *Fishmongers' Company* v. *Robertson* (2), where, upon a contract not under the seal of the plaintiffs, but of which the defendants had taken the benefit, the plaintiffs were held entitled to sue. In that case Tindal, C.J., delivers an elaborate judgment (3), in the course of which he says: "Upon the general ground of reason and justice, no such answer (i.e., no such answer as the want of plaintiffs' common seal) can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promise; such promise by them is, therefore, not nudum pactum: they never can want to sue the corporation upon the contract in order to enforce the performance of those stipulations which have already been voluntarily performed; and, therefore, no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them, on the ground of inability to sue the corporation, which suit they can never want to maintain." The contract, therefore, was upheld on the ground of part performance; but the learned Chief Justice proceeds as follows: "It may possibly be the case that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract; and that the defendants might during that interval have the power to retract, and insist that their undertaking amounted to a nudum pactum only."

Now that was the case here at the time when the alleged breach of contract arose. At that time, to use the language of Tindal, C.J., the corporation had not "performed the stipulations on their part," and had done no act to bind them to do so; at

(1) Law Rep. 4 Ex. 162. (2) 5 M. & G. 131.
(3) 5 M. & G. at p. 193.

that time, therefore, the defendant might equally say he was not bound.

Therefore, but for what follows, our decision would be clearly consistent with all the authority upon the subject. But in the case just referred to, Tindal, C.J., did certainly use language which, though only obiter dictum, induced me for some time to pause. A little earlier in the judgment than the passage already quoted he says. (1) "Even if the contract put in suit by the corporation had been, on their part, executory only, not executed—we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves; and that such admission on the record would estop them from setting up as an objection, in a cross action, that it was not sealed with their common seal," and he refers in support of this observation to the *Mayor of Thetford's Case.* (2) Now, when that case is looked at it does not really support this dictum in any degree. That was the case of a mandamus to a corporation to which they made a return, which was objected to on the ground that it should have been sealed, but was held good on the ground that it was matter of record. There is surely a great difference between a return to a mandamus which is a matter of record, and a mere allegation by the corporation in their declaration that they had entered into a contract. There is no authority for saying that any allegation in a declaration by a corporation is binding upon them, unless it is made material by a judgment binding them as a matter of record. And in *Copper Miners of England* v. *Fox* (3) where this dictum was relied upon by the plaintiffs, it is completely overruled. That was an action by a corporation on an agreement for the purchase and sale of iron; the contract was in writing, but not under seal, and the objection was made that the corporation was not bound, and that there was therefore no mutuality. Lord Campbell says "The plaintiffs finally rely upon a suggestion of Tindal, C.J., in the *Fishmongers' Company* v. *Robertson* (1), that when a corporation have sued as plaintiffs upon a simple contract, they may possibly for ever be estopped from objecting that the

(1) 5 M. & G. at p. 192.
(2) 1 Salk. 192; 3 Salk, 103.
(3) 16 Q. B. 229; 20 L. J. (Q.B.) 174.

1873

MAYOR OF KIDDERMINSTER v. HARDWICK.

contract was not binding upon them, so as to afford a remedy to the other side by cross action, and to take away the objection of want of reciprocity; but there is great difficulty in saying what shall be the form of action to which the opposite side may resort, or from what point of time the estoppel is to operate; and, after all, it would only give a remedy upon the contract where the corporation have first deemed it for their advantage to enforce it by action; the other side being left without remedy when the corporation wish entirely to break and abandon it." The dictum of Tindal, C.J., must therefore be considered as entirely unsupported.

I need only say further, that it has been argued that there has been a part performance by the plaintiffs by letting the defendant into possession; but on the evidence that allegation is entirely unfounded. Whatever was done, was done while the whole matter was still in fieri, and whilst the defendant was taking advantage of the indulgence of a few days granted him for producing his sureties; the town clerk had not only not authorized, but had forbidden the keys to be given him; the mere circumstance therefore, that the keys were in fact delivered to him, and remained in his custody for a short time, was no letting of him into possession by the deliberate act of the corporation; it was in truth a mere mistake. Nor did this so-called possession ever extend beyond a mere constructive possession, for the defendant did not enter into the market place, nor occupy it for profit or advantage, nor even attempt to take the tolls.

It was finally argued that there was a ratification of the contract by the resolution under seal on the 7th of August. But that (even supposing it to amount to a ratification, which may be doubted) came too late; it came after the breach, which is the time we must look at, and therefore cannot enable the plaintiffs to maintain this action.

PIGOTT, B. I agree with my Lord that this rule must be made absolute. I think there was no mutuality for want of the plaintiffs' seal. This was a contract which, if made by a corporation, ordinarily requires a seal, and to which the plaintiffs' seal was never affixed, for the alleged confirmation by the resolution of the 7th of August was not till after the defendant had with-

drawn from the contract (as the correspondence shews), and therefore came too late.

Then was there anything to bring the case within any established exception to the ordinary rule? It seems to me there was not. It is said that there was a part performance by payment of rent; but when the conditions are looked at, I think it was not a part performance at all, and that the money was neither paid nor received as such; it was paid as a security that the defendant would observe the conditions under which the auctioneer sold; it was to be paid before the contract could be completed by signing the agreement.

Then as to the taking of possession, which is relied upon as a kind of estoppel, it appears that, in the first place, the town clerk had no authority to give possession; that, in the second place, he did not give it; and that, thirdly, the defendant did not take it as part performance; for all that appears, he may only have been to look at the market.

That disposes of the facts of the case, and brings me to the only thing that has caused me any doubt—the dictum of Tindal, C.J., to which my Lord has already referred; but the comments of Lord Campbell on that dictum in *Copper Miners of England* v. *Fox* (1) have removed that doubt and leave the case free from difficulty.

Although I regret that our judgment will be to give effect to what I cannot but regard as a technicality, I think we are bound to make this rule absolute.

POLLOCK, B. I am of the same opinion. The action is brought by a corporation for breach of an executory contract, and it is open to the defendant, under the circumstances, to shew that, though it was signed by himself, it was not binding on him in consequence of the plaintiffs' not being bound.

In *Mayor of Stafford* v. *Tilt* (2) it is said: "Where a party has occupied land the contract between him and the landlord must be considered as executed, so that there is no necessity for alleging in the declaration any express promise to pay; from the fact of occupation a promise to pay will be implied; although in an exe-

(1) 16 Q. B. 229; 20 L. J. (Q. B.) 174. (2) 4 Bing. at p. 77.

1873

MAYOR OF KIDDERMINSTER v. HARDWICK.

cutory contract the plaintiff must rest his case upon an express promise, and where that is so, if one of the parties is not in a condition to enter into a promise, he cannot take advantage of a promise by the other, because there would be no mutuality in the contract." It is quite clear that it did not then enter into the mind of the Court that any such proposition as that implied in the dictum of Tindal, C.J., was correct. Now it has been always said that a corporation can only act under seal, and that for that reason they must appoint agents for the transaction of their business. This is so laid down in Co. Litt. 66 b., and is referred to in Story on Agency, § 16; and it is open to every corporation to get rid of the whole difficulty by appointing an agent to act for them under seal. I think the objection is not a merely technical one. I should adopt the words of Rolfe, B., in delivering the judgment of the Court, in *Mayor of Ludlow* v. *Charlton* (1): "The seal is required as authenticating the concurrence of the whole body corporate. . . . The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times." I cannot imagine a case where the rule should more clearly be upheld than the present one, where we are asked to assume, in support of the defendant's rights against the corporation, a great deal which at the utmost consists only of acts of the officers of the corporation.

It is said that the case comes within one of two exceptions. First, it is said that this was an ordinary act, such as did not require a seal; but not much reliance was placed on that, and rightly. The other exception is, where there has been anything like enjoyment by the defendant who is sued by the corporation, which would estop him from saying that there was no bargain, because he had enjoyed what he had bargained for. This fails in fact, because the defendant never did occupy or enjoy, and I see no consideration which would entitle him to file his bill in equity to enforce the contract on which the plaintiffs sue. He might, perhaps, have succeeded in recovering back his deposit, but he could have done no more.

(1) 6 M. & W. at p. 823.

On all grounds, therefore, I think the plaintiffs fail; and in so deciding we not only act in accordance with the authorities, but give effect to a rule which is a safe guide to the public in dealing with corporations.

Rule absolute.

Attorneys for plaintiffs: *Robinson & Preston, for Morton, Kidderminster.*

Attorneys for defendant: *Prior, Bigg, & Co., for Knott, Worcester.*

SPEAK, APPELLANT; POWELL AND OTHERS, RESPONDENTS.

Nov. 20.

Tax on Carriages—Exemption—Carriages used solely for the Conveyance of any Goods or Burden in the Course of Trade—32 & 33 *Vict. c.* 14, *s.* 39, *subs.* 6.

The business of a travelling circus is not a trade, and carriages belonging to a circus, and used for carrying the band and other performers in a parade through the town, are not carriages "used solely for the conveyance of any goods or burden in the course of trade," so as to be exempt from duty under 32 & 33 Vict. c. 14, s. 19, subs. 6.

CASE stated, under 20 & 21 Vict. c. 43, by justices of the petty sessions at Bishop Auckland, Durham, on dismissing an information preferred by an excise officer under 32 & 33 Vict. c. 14, s. 27, against the respondents for keeping carriages without a licence.

By s. 18 of 32 & 33 Vict. c. 14, certain duties are imposed in respect of "carriages," and are to be paid by licences to be taken out by the persons keeping the carriages.

By s. 19, subs. 6, "the term 'carriage' means and includes any vehicle drawn by a horse or mule, or horses or mules, *except* a waggon, cart, or other vehicle, used solely for the conveyance of any goods or burden in the course of trade or husbandry," and which has the owner's name and place of business painted on it as therein mentioned.

Sect. 27 imposes a penalty for using a carriage without a licence.

The respondents were proprietors of a travelling circus, and it was stated in the case to be part of their course of trade or business to give a daily parade of their horses and carriages through the towns which they visit.

1873

SPEAK v. POWELL.

On the 29th of July, 1872, the respondents had their usual parade at Bishop Auckland, which they were visiting. In the procession were three carriages drawn by horses; one carried the band, the two others carried four persons each, the persons on one of the latter carriages being gaily dressed and carrying flags. These carriages were used by the respondents for carrying portions of the baggage and property of the circus from place to place, and at the time the procession took place there were in the band-carriage clothes belonging to the circus, and also the music and musical instruments of the circus, and in all three carriages some loose deal boards and brackets.

The respondents claimed to be within the exception of s. 19, subs. 6; and the justices held that they were so, on the ground that the persons carried in the carriages, in conjunction with the circus clothes, deal boards and brackets, were to be considered as a burden conveyed in the course of trade; but, at the request of the appellant, stated this case, imposing a mitigated penalty of 5*l.* in the event of the Court reversing their decision.

H. James, A.G. (*Locke, Q.C.*, and *C. Bowen*, with him), for the Crown, after stating the case, was stopped by the Court.

Cave (*Lawrence* with him), for the respondents. The word "trade" has, according to Johnson's definition, a narrower and a wider meaning; the narrower meaning is "traffic; commerce; exchange of goods for other goods, or for money." The wider meaning is "occupation; particular employment, whether manual or mercantile, distinguished from the liberal or learned professions." (Johnson's Dict., sub voce). The narrower meaning cannot be the one intended; for this would exclude from the exception many recognised trades, such as that of a carrier, and all trades which consisted, not in selling goods, but in expending labour upon them, such as those of a dyer or a laundress. The wider meaning must therefore be intended, and the respondents' employment is thus within the definition. If so, then the carriages in question were conveying "goods or burdens in the course of trade." The word "burden" is plainly meant to include something which could not be properly called goods, and signifies anything carried; a scavenger's or contractor's cart, carrying earth or rubbish, would

carry burdens within the meaning of the exception. So persons may be burdens, as in the words, "Set down your venerable burden"—'As You Like It,' Act ii., sc. 7. There are many trades, such as that of whitawers (1), which consist in carrying labour from place to place, and in such cases the persons carried for that purpose would properly be described as burdens carried in the course of trade. So here the persons carried, as well as the articles mentioned, were burdens conveyed; and they were so conveyed "in the course of trade." This is stated as a fact in the case, and is rightly so stated. The words "course of trade" must be construed with reference to the nature of the trade carried on, and the words cannot mean less than to include everything which is done in the ordinary course of carrying on the trade in question, and is conducive to that object. With a spectacular business like that of a circus, the parade through the town is as much a part of the business as the performance within the tent or building.

[BRAMWELL, B. Would a traveller going about in a gig to solicit orders be a burden carried in the course of trade?]

It is contended that he would.

KELLY, C.B. I am of opinion that the respondents have not succeeded in shewing themselves to be within the exemption, if we are to take the words of the statute, as we must take them, according to their ordinary meaning. These carts or waggons cannot be properly said to have been conveying any "goods or burden" of the respondents in the course of their trade. I may give as an illustration of the meaning of the statute—the case of a coal merchant sending his carts or waggons to fetch coal to his yard, or to convey it to his customers, or a wine merchant, or other tradesman similarly supplying goods in the ordinary course of business. Now, in the first place, I think the occupation of the respondents is not a trade at all, but rather resembles a profession, consisting in the exercise and exhibition of special personal faculties and endowments. It is certain that no actor, nor any person exhibit-

(1) "*Whitawer*," a collar-maker, or maker of husbandry harness. A.-Sax. *hwit-tawer*, a dresser or worker of white or whitleather.—Baker's Northamptonshire Glossary, sub voce. In the same work "whitleather" is described as "untanned leather made from horses' hides, and used for hedge mittens, and *whitleather* thongs." Whitawers were stated by Cave to be itinerant.

1873

SPEAK v. POWELL.

ing (like the respondents) gymnastic feats in public, nor even the proprietor of a theatre, would be a trader within the meaning of the Bankruptcy Act now in force, or any earlier Bankruptcy Act; nor do I think they are such within the meaning of the Act before us. But, in the second place, these carts and waggons were clearly not being used "solely" for the purpose of conveying goods or burdens. This parade was not a carrying on of the respondents' business, but a show or spectacle, intended as an advertisement of how they carry it on, and the things that were conveyed in the carts were not conveyed for the purpose or in the course of their business, but either for the purpose of the show or spectacle, or for no purpose whatever. Our judgment must therefore be for the Crown.

BRAMWELL, B. I am of the same opinion. First, I think this was not a "conveyance of any goods or burden in the course of trade;" by which I understand to be meant that the goods or burdens are goods or burdens by the conveyance of which the trade is carried on. I cannot think that in the case I put during the argument, of a person carrying on his trade by means of sending out a traveller in a gig to obtain orders, the gig would be exempted, on the ground that the traveller was a "burden" conveyed in the course of trade. Mr. Cave has put several ingenious instances, which it is not easy to answer; but however some of those cases ought to be decided, I have no doubt that the present case is not within the exemption. Further, it is clear that this was not a conveyance of the goods "solely" in the course of trade. This "parade," as it is termed, rather resembled the carts we sometimes see in the streets, covered with pictures or placards, and drawn about as an advertisement. On both grounds I think the respondents fail.

PIGOTT and POLLOCK, BB., concurred.

Attorney for the Crown: *The Solicitor of Inland Revenue.*
Attorney for respondents: *Bell.*

THE ATTORNEY GENERAL *v.* LOMAS.

1873
Nov. 20.

Probate Duty—Absolute Trust for the Conversion of Land—Heir taking undisposed-of Interest in Realty.

When a will contains an absolute trust for the conversion of land, and, by reason of the failure of the limitations of the proceeds contained in the will, the testator's heir takes the undisposed-of interest, he takes it as money, and on his death probate duty is payable upon it, although the land still remains unsold.

C. J. B. by his will directed his real estate to be converted, and the proceeds, with his personalty, to be held in trust for the payment of debts and legacies, and, as to the residue, on certain trusts which failed. The testator's heiress, M. B., became, by reason of the failure of the last-mentioned trusts, entitled to the proceeds of the real estate. She died under twenty-one, and at the time of her death the real estate was unsold :—

Held, that the interest which M. B. took as heiress of C. J. B. was taken by her as money, and that probate duty was payable by her administrator in respect of it.

INFORMATION claiming probate duty from the administrator of Margaret Buckley under the following circumstances :—

C. J. Buckley, by his will dated the 22nd of September, 1863, after bequeathing certain specific and pecuniary legacies, devised all his real estate (except mortgages) to trustees on trust to sell the same at such time or times as the trustee or trustees for the time being of his will should in their or his discretion deem expedient, with power to sell any part for a ground rent, to be secured on the land sold, and to be settled subject to the same trusts and provisions, including the trusts for sale, as the premises so sold; and bequeathed the residue of his personal estate to the same trustees upon trust to convert the same into money (with power at discretion to continue any securities included in the description of securities thereinafter directed). And as to the moneys arising from the sale of the said real and residuary estates, or constituting the same, after payment of his debts, funeral and testamentary expenses, and the payment of the several legacies therein bequeathed, upon trust to invest the said moneys in the securities therein mentioned, and to hold all the said trust moneys, stocks, funds, and securities, and the interest and income thereof, in trust to pay his wife an annuity of 100*l.* for her life, and as to the residue of the said trust moneys, stocks, funds, and securities, and the interest

1873

ATTORNEY GENERAL v. LOMAS.

and income thereof, and also as to the sum (if any) set apart to secure the said annuity, after the ceasing of the annuity, in trust for all his children living at his decease, and such of the issue then living of any child or children dying in his lifetime as, either before or after his decease, had attained or should attain twenty-one, or, if a female, had been or should be married, as tenants in common per stirpes; and the testator declared that, if there should be no child of his who should attain twenty-one, nor any issue of any child dying under that age, who should be living in the lifetime of any child, and should attain twenty-one, then, from and after such default or failure of children and issue of such children as aforesaid, he bequeathed the said trust moneys, stocks, funds, and securities, as to the sums of 3000*l.*, 1000*l.*, and 1000*l.*, to his brother W. L. Buckley and his sisters M. L. Buckley and C. Buckley respectively. And as to all the rest, residue, and remainder thereof, and generally of all his estates and effects not otherwise disposed of, he gave, devised, and bequeathed the same to the trustees or trustee for the time being of his will, in trust for the child, or for the children equally, of his brother R. B. Buckley then living, and such issue then living of his said child or children then deceased as should attain twenty-one or marry, as tenants in common per stirpes. And the will contained a proviso that the testator's unsold real estate and outstanding personal estate should be subject to the trusts thereinbefore contained concerning the moneys, stocks, and securities aforesaid, and that the rents and yearly produce thereof should be deemed annual produce for the purposes of such trusts, and that such real estate should be transmissible as personal estate under the trusts thereinbefore contained; and also contained powers, until sale, to manage the estate and to raise money on mortgage for the purposes of the trust, and also to invest moneys in the purchase of lands to be held by the trustees upon and for the like powers and provisions as to sale and conversion and otherwise as the real estate devised, and also, with the consent in writing of all his children then living and of the age of twenty-one, instead of selling any part of his estate, to appropriate such part in or towards satisfaction of any share or legacy thereby given to or in favour of any of his children or issue.

1873

ATTORNEY GENERAL v. LOMAS.

The testator died on the 6th of May, 1865, having had one child only, Margaret Buckley, who died on the 8th of February, 1871, an infant and unmarried.

The testator's brother R. B. Buckley was still living, and had had only one child, who died in 1860, an infant and unmarried.

Margaret Buckley was the testator's heiress-at-law, and one of his next of kin.

The testator owned, at the time of his death, real estate which, at the time of Margaret Buckley's death, had not been sold or contracted to be sold, but which had since been sold for the sum of 3825*l.*, and that sum had been paid to her administrator, and included by him in his residuary account.

The Crown claimed probate duty from the administrator of Margaret Buckley on this real estate, as being in equity to be treated as absolutely converted into personalty.

H. James, A.G., and *W. W. Karslake*, for the Crown. The limitations of the will in favour of the testator's children failed, no child having lived to attain twenty-one or having married. The limitations to the children of R. Buckley failed also, there being no child, nor the issue of any child, of R. Buckley living at the death of Margaret Buckley. Subject, therefore, to the payment of the debts, funeral and testamentary expenses and legacies, the testator's property went, so far as it consisted of realty, to Margaret Buckley as his heiress-at-law. But what was the character of the property as she took it, and as it passed upon her death to her representatives? There was an absolute trust for conversion, by reason of which the real estate was converted into personalty: *Fletcher* v. *Ashburner*. (1) It is true that a direction to convert does not operate to change the course of descent or devolution from the *testator* further than is necessary to effectuate the purposes of the will: *Ackroyd* v. *Smithson* (2); *Countess of Bective* v. *Hodgson* (3); *Jessopp* v. *Watson* (4); but it affects the character of the property. If the purposes of the will for which conversion was directed wholly fail, so that it is unnecessary to convert the land, or where there is merely a discretionary power to convert, the heir will take

(1) 1 Wh. & T. L. C. (4th ed.) p. 826.
(2) 1 Wh. & T. L. C. (4th ed.) p. 872.
(3) 10 H. L. C. 656.
(4) 1 My. & K. 665.

10 Jun 1873

1873

ATTORNEY GENERAL v. LOMAS.

that which descends to him as land, even though it may have been actually converted: *Davenport* v. *Coltman* (1); *Bourne* v. *Bourne.* (2) But where there is an absolute direction to convert, and only a discretion given as to the time and mode of conversion, or where the proceeds of the realty and personalty are to form a joint fund for the purposes of the will, this direction impresses the land with the character of money, and it is taken as money by the heir: *Jessopp* v. *Watson.* (3) Land, therefore, which a will absolutely directs to be converted, and which comes to the heir through failure of some of the purposes for which the conversion was directed, forms part of his personal estate, unless he has had the opportunity of electing, and has elected, to take it as land and not as money: *Pulteney* v. *Darlington* (4), and is, on the principle of *Attorney General* v. *Brunning* (5), liable to probate duty; and in general, if an absolute and positive trust for conversion is created, this effect takes place whether the land has or has not been sold at the time of the death of the person whose estate is in question: *Williamson* v. *Advocate General.* (6) The only two cases which seem opposed to this view are *Matson* v. *Swift* (7) and *Custance* v. *Bradshaw* (8); but in the former of these cases the deed which was relied on as producing the effect of conversion was a voluntary deed of the testator, which remained subject to his directions, and which had in fact never been acted on; and in the latter case there was nothing to compel a conversion, and the partners, of whom the deceased was one, had in fact elected to treat the land as land by taking a conveyance to themselves as tenants in common. (See the comments of James, V.C., on this case in *Forbes* v. *Steven.* (9)) Now in the present case it is clear that a conversion of the land into money is absolutely directed, and is necessary for effecting the purposes of the will; for although the ultimate limitations of the fund have failed, the charge of the debts, legacies, &c., upon the fund remains good. One joint fund is created out of the personalty and the proceeds of the realty; out of that fund these payments are to be made, and it is therefore

(1) 12 Sim. 588, 610.
(2) 2 Hare, 35.
(3) 1 My. & K. 665.
(4) 1 Bro. C. C. 222.
(5) 8 H. L. C. 243; 30 L. J. (Ex.) 379.
(6) 10 Cl. & F. 1.
(7) 8 Beav. 368.
(8) 4 Hare, 315.
(9) Law Rep. 10 Eq. at p. 191.

1873

ATTORNEY GENERAL v. LOMAS.

necessary, for the purpose of adjusting the rights of the next of kin and the heiress, that the land should be sold. Nor could any one have claimed to restrain the sale or elected to take the land as land, except by combining the rights of Margaret Buckley and the rest of the next of kin, and it is equally clear that, even if Margaret Buckley had ever had the right to elect, she never had the capacity for its exercise.

Some expressions used in *Forbes* v. *Steven* (1) and *De Lancy* v. *Reg.* (2) may at first sight seem favourable to the defendant, but those cases only refer to legacy duty. That the actual state of the property is not decisive is clearly established by *Attorney General* v. *Brunning* (3) and *Williamson* v. *Advocate General.* (4) The question is really solved by considering what it was that Margaret Buckley was entitled to as the heiress of C. J. Buckley. Was it land, or the produce of land? Clearly not land, but only its produce.

Philbrick (*Sir J. B. Karslake, Q.C.*, with him), for the defendant. To determine whether probate duty is payable, the character of the property at the time must be considered. Per James, V.C., in *Forbes* v. *Steven.* (1)

It cannot be maintained that it was necessary for the purposes of the will that the conversion should take place; the debts and legacies were primarily chargeable on the personal estate, which is not shewn to be insufficient: *Chitty* v. *Parker.* (5)

No reply was called for.

KELLY, C.B. I am of opinion that the Attorney-General is entitled to the judgment of the Court. Whatever doubt may have occurred on the point has been set at rest by a series of decisions, which have been uniformly to the effect that when real property is expressly directed by will to be sold, and the proceeds are, with the personalty, to form one fund, the land, though unsold at the time when any person entitled to an interest in the joint fund dies, is nevertheless to be treated as money for the purpose of probate duty. The cases referred to clearly point out and establish a distinction in the operation of trusts for conversion contained in a

(1) Law Rep. 10 Eq. 178, at p. 185.
(2) Law Rep. 5 Ex. 102.
(3) 3 H. L. C. 243; 30 L. J. (Ex.) 379.
(4) 10 Cl. & F. 1.
(5) 2 Ves. Jun. 271.

1873

ATTORNEY GENERAL v. LOMAS.

will, both for the purpose of the devolution of the property and for the purpose of probate duty. If the land remains unconverted at the time when the heir who takes an undisposed-of interest in it dies, and if there is nothing in the will making it necessary to convert it, it is taken as land, and devolves according to the rules governing the descent of real estate; but when there is a legal obligation to sell, and the proceeds are to form a portion of a joint and single fund for the purposes of the will, then, whatever may be the condition of the property at the time of the death of the heir taking the undisposed-of interest, it is, both for the purpose of devolution and for the purpose of probate duty, to be considered as money. Without referring further to the cases cited, the case of *Attorney General* v. *Brunning* (1) is clear and conclusive on this point. It is observed by James, V.C. in *Forbes* v. *Steven* (2) that the liability to probate duty depends on the character of the property at the time; but when the character of the property is changed by the positive direction of the will, the Crown is entitled to both probate and legacy duty by virtue of the character so impressed on the property.

Now, looking at this will, there can be no reasonable doubt as to its effect; the testator, in the first place, positively directs his real estate to be converted into money, and the proceeds, with the proceeds of the residuary personal estate, to be applied, after payment of his debts, in the payment of several legacies, with certain ultimate trusts of the residue which never took effect. The whole is constituted one entire fund. No person entitled to anything under the will could have prevented the trustees from selling, or relieved them of their absolute liability and obligation to sell; the whole, therefore, is stamped with the character of money.

With regard to the cases of *Matson* v. *Swift* (3), and *Custance* v. *Bradshaw* (4) referred to for the defendant as qualifying the effect of the cases relied on by the Crown, the distinction has been already pointed out. In *Matson* v. *Swift* (3) an authority was given to sell, but no obligation to do so was imposed on the trustees; and so in *Custance* v. *Bradshaw* (4) there was nothing

(1) 8 H. L. C. 243; 30 L. J. (Ex.) 379.
(2) Law Rep. 10 Eq. 178, at p. 185.
(3) 8 Beav. 368.
(4) 4 Hare, 315.

1873

ATTORNEY GENERAL v. LOMAS.

rendering it obligatory on those who had to administer the estate to convert the land.

The case of *Chitty* v. *Parker* (1), which was also referred to by the defendant is obscurely reported, but from the judgment of the Lord Chancellor it appears that "it was agreed on all sides that the Court is not to execute this will in toto, that the real estate is not to be converted into money, in order to have the quality of money, and to go as money." The Chancellor must, therefore, have seen from the will before him that there was no positive direction in the will to convert, and the case therefore contains nothing inconsistent with the decision which we pronounce in the one before us. On these grounds our judgment must be for the Crown.

BRAMWELL, PIGOTT, and POLLOCK, BB., concurred.

Judgment for the Crown. (2)

Attorney for the Crown: *The Solicitor of Inland Revenue.*
Attorney for defendant: *Dunster.*

THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* GIDLOW.

Nov. 5.

Costs—Interest upon Judgment for Costs in Cause—Interest upon Costs in Courts of Appeal.

By a rule of Trinity Term, 1867, it is ordered that on appeal from one of the Superior Courts, such Court shall have power to allow interest for such time as execution has been delayed by the proceedings in appeal for the delaying thereof:—

Held, that in a case where a defendant had obtained judgment for his costs, against which judgment there had been unsuccessful appeals to the Exchequer Chamber and House of Lords, interest could be allowed only upon the sum for which judgment was originally obtained in the Court below, and not upon the costs of the appeals.

IN this case judgment for his costs was given for the defendant in this court. The plaintiffs appealed to the Court of Exchequer

(1) 2 Ves. Jun. 271.

(2) No question was raised as to the amount to be deducted from the value of the interest in the real estate taken by Margaret Buckley by reason of the charge of debts and legacies on the joint fund.

1873

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. GIDLOW.

Chamber, who affirmed the judgment with costs. Thence the plaintiffs appealed to the House of Lords, who affirmed the judgment of the Court of Exchequer Chamber, and directed the plaintiffs to pay such sum for costs as the taxing officer of the House should fix. (See order of House of Lords, April 3, 1853.)

Subsequently, Honyman, J., made an order at Chambers that interest should be computed and paid to the defendant upon the sum for which judgment was given in the Court of Exchequer from the date of the judgment until satisfaction.

Holker, *Q.C.*, moved for a rule calling on the plaintiffs to shew cause why this order should not be varied by directing that interest should be computed and paid to the defendant upon the whole of the costs incurred by him, including the costs in the Exchequer Chamber and House of Lords. The judgment here is for the defendant's costs in the cause, and proceedings in error or on appeal are a "step in the cause:" Common Law Procedure Act, 1852, s. 76; and the costs of the appeal are costs in the cause. By rule 26 of Trinity Term, 1853, it is provided that on error from one of the Superior Courts, such court shall have power to allow interest for such time as execution has been delayed by the proceedings in error for the delaying thereof, and this rule is applied to appeals by Regula Generalis, Trinity Term, 1867. These provisions are similar to that of 3 & 4 Wm. 4, c. 42, s. 30, which enacted that the Court of Error should allow interest for the time during which execution was delayed. But the interest ought to be calculated upon the whole costs, otherwise the defendant does not get the full benefit of the rule.

KELLY, C.B. There should be no rule in this case. By 3 & 4 Wm. 4, c. 42, s. 30, it was enacted that "if any person shall sue out a writ of error upon any judgment whatsoever given in any court in any action personal and the Court of Error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error for the delaying thereof." Writs of error are now abolished, and error is a "step in the cause;" and this court has now, upon error being brought, a similar power of awarding

interest by virtue of the 26th rule of Trinity Term, 1853; a power which was by the Regula Generalis of Trinity Term, 1867, extended to the case of an appeal. But this interest is for the delay in execution, and must be interest upon the sum for which judgment has been originally given. It is now contended that where a defendant obtains judgment for costs, then, in case of an unsuccessful appeal by the plaintiff to the Exchequer Chamber and House of Lords, the defendant is entitled to recover interest, not only on the costs of the cause for which his judgment in the court below was, but also on the costs of the cause, including the costs of the appeals. I do not think this is the true construction of the rule of Trinity Term, 1867. With regard to the House of Lords, the sum awarded for costs is entirely in their discretion. They may affirm a judgment without costs, or with an amount for costs to be fixed by an officer of the House, or they may give a fixed sum, not by the name of costs, but in satisfaction of them. I cannot find any statute enabling this Court to interfere and give interest on that sum. Again, where the Exchequer Chamber affirms a judgment of the Court below with costs, I cannot find any enactment which would warrant this Court in including in the sum on which interest is to be given the costs of the appeal.

MARTIN, B. Costs awarded in the Exchequer Chamber and House of Lords cannot bear interest, unless by statute; and there is no statute empowering this Court to give interest upon such costs. I therefore agree that there should be no rule.

PIGOTT, B. I am of the same opinion. Our power to give interest is limited by the 26th rule of Trinity Term, 1853, which was applied to appeals by the rule of Trinity Term, 1867; and I do not think that we are thereby enabled to give interest upon anything but the amount for which judgment was originally obtained in the court below.

Rule refused.

Attorneys for defendant: *Chester, Urquhart, & Co.*

1873
Nov. 19.

CHARLESWORTH and Another *v.* HOLT.

Separation Deed—Husband and Wife—Covenant to pay Annuity—Subsequent Divorce—22 & 23 Vict. c. 61, s. 5.

5 PD 139
84 LT 677

By a separation deed reciting that differences existed between the defendant and his wife, and that they had agreed to separate, the defendant covenanted with trustees to pay them an annuity for his wife's support "during their joint lives and so long as they should live separate and apart." The deed contained clauses which indicated that the parties to the deed contemplated that the marriage relation would continue to exist between the defendant and his wife. In an action by the trustees for arrears of the annuity :—

Held, that a plea setting forth the deed and alleging the wife's subsequent adultery, and the dissolution of the marriage in consequence, was bad, there being no express words limiting the defendant's obligation to the period during which the marriage tie subsisted.

Quære, whether 22 & 23 Vict. c. 61, s. 5, applies to deeds made before the passing of the Act.

Declaration on the breach of a covenant by the defendant with the plaintiffs, to pay them an annuity of 63*l.* in quarterly instalments, for the separate use of Lucy Holt, the defendant's wife, during the joint lives of the defendant and Lucy Holt, and during so long as they should live separate and apart.

Plea, setting out verbatim the deed, which was dated on the 17th of December, 1858, and purported to be made between the defendant of the first part, Lucy Holt, his wife, of the second part, and the plaintiffs of the third part: [By this deed, after reciting that differences subsisted between the defendant and Lucy "his wife," by reason whereof they had agreed to live separate and apart for the future, that in consideration of the premises and by way of making provision for Lucy Holt "during so long time as they shall live separate and apart," the defendant had agreed to allow "the said Lucy Holt, his wife, during the joint lives of himself and his said wife, and so long as they shall live separate and apart" the yearly sum of 63*l.*, that in case of defendant's death before that of Lucy, his executors should pay her the sum of 63*l.* as soon as conveniently might be, and "in case the said Lucy Holt his wife should die" before the defendant, that then he should pay the plaintiffs 15*l.* towards her funeral expenses; the defendant, in pursuance of the recited agreement, covenanted to pay the agreed

1873

CHARLESWORTH v. HOLT.

annuity during the joint lives of himself and Lucy Holt, "and during so long time as they should live separate and apart," and that, in case of her dying before the defendant, then the defendant, "her husband," would pay the plaintiffs 15*l.* towards her funeral expenses; that notwithstanding the marriage it should be lawful for the said Lucy Holt at all times to live apart from the defendant, "as if she were sole and unmarried;" that he would not take proceedings to compel a return to cohabitation; that it should be lawful for Lucy to have for her separate use "notwithstanding her coverture," all jewels, &c., bequeathed or given to her; that if she died first the defendant would allow her will (if any) bequeathing her separate property to be proved by the executors therein named, or if there were none, or she died intestate, would allow administration of her separate property to such persons as would be entitled if he were dead and would permit them to distribute it amongst her next of kin; and the plaintiff Charlesworth covenanted with the defendant that Lucy Holt would not take proceedings to compel a return to cohabitation and undertook to indemnify him against all debts incurred by Lucy Holt whilst she was living "separate and apart from her said husband."] The plea then alleged that after the execution of the said deed Lucy Holt committed adultery, and thereupon the defendant commenced a suit for dissolution of the marriage, and the marriage was dissolved by the decree absolute of the Divorce Court, and the payments sued for accrued due after the dissolution.

Demurrer and joinder.

Herschell, Q.C. (*T. Atkinson,* with him), in support of the demurrer. The deed continues to operate, although the marriage is dissolved. No doubt the parties to it contemplated that the marriage tie would continue to exist, but they have used no words to limit their obligation to that period. In *Baynon* v. *Batley* (1), it was held that the wife's adultery after separation was no answer to a covenant to pay a trustee a separate maintenance for the wife. So in *Jee* v. *Thurlow* (2) a plea stating that the wife had been divorced à mensâ et thoro, was held no defence to an action by the trustee for arrears.

(1) 8 Bing. 256. (2) 2 B. & C. 547.

1873

CHARLESWORTH v. HOLT.

The Court of Chancery will not set aside a separation deed after a divorce: *Evans* v. *Carrington*. (1) In *Goslin* v. *Clark* (2), a dissolution of marriage on the ground of adultery was held no answer to an action for arrears of an annuity under a separation deed. Moreover such a deed is within the scope of 22 & 23 Vict. c. 61, s. 5, and can be dealt with by the Divorce Court, *Worsley* v. *Worsley*. (3)

[BRAMWELL, B. That Act was passed after the date of this deed.]

The Act seems to be applicable to all then existing as well as to future deeds.

Holker, Q.C. (*K. Digby*, with him), contrà. The deed from beginning to end contemplates the continuance of the marriage, and the covenant should be read as limited to the period during which Lucy Holt is the wife of the defendant and is living apart from him. The question is one of construction. In the cases referred to, the covenant to pay was absolute; but here the period of payment is limited. The 22 & 23 Vict. c. 61, s. 5, cannot apply to deeds executed before it was passed. The result, therefore, of holding the plea no answer will be to impose upon the defendant the burthen of paying an annuity to the plaintiff for the rest of Lucy Holt's life, and also of contributing to her funeral expenses if she dies first, although she is now in the position of a stranger to the defendant.

Herschell, Q.C., was not called on to reply.

KELLY, C.B. I think the plaintiffs are entitled to our judgment. The husband might, in this case, have introduced express words limiting his liability to the period during which Lucy Holt remained his wife. But there are no such words, and Mr. Holker has not satisfied me that any words are used which necessarily imply that the covenant is only to be binding during the continuance of the marriage tie. It is impossible for the Court to add such a term to the contract. If the contract were to be so construed, it would be possible for the husband, by giving grounds

(1) 2 D. F. & J. 481; 30 L. J. (Ch.) 364. 7 Jur. N.S. 161

(2) 12 C. B. (N.S.) 681; 31 L. J. (C.P.) 330. 9 Jur. N.S. 526

(3) Law Rep. 1 P. & M. 648.

to his wife for a petition for divorce against him, to put an end to his liability. Suppose, for example, he were guilty of adultery and desertion, and the wife obtained a decree for dissolution, he would be freed by means of his own misconduct. We certainly ought not, unless constrained by express words or clear implication, so to interpret the contract.

BRAMWELL, B. I am of the same opinion. Mr. Holker does not ask us to imply the condition he contends for, but to hold that the language of the deed itself in effect expresses that it is only to operate so long as the marriage remains undissolved. Now a man who becomes a party to such a deed as this, the object of which is once for all to provide for the wife during the separation, could by unmistakeable words limit his liability to the period during which the marriage relation continues. Mr. Holker contends that the covenant is only operative as long as the parties live apart and the status of husband and wife exists between them. But I think the husband's covenant is absolute; and even in case of the husband and wife resuming cohabitation, the trustees would be entitled to insist upon payment of the annuity, were it not for the clause which limits the obligation to such time as they shall live apart from each other.

There are, no doubt, expressions in the deed which seem to contemplate the continuance of the marriage. Thus the parties throughout are described as "husband" and "wife"; the husband, in case of his wife dying first, is to pay 15*l.* towards her funeral expenses, and is not to interfere with her testamentary disposition or with the distribution of her separate property. From these and other clauses it is plain that a divorce was not in the contemplation of either party; but I nevertheless see nothing to restrict the operation of the defendant's covenant, except the single condition that Lucy Holt and himself shall be living separate and apart. If they had come together again there would be no liability on his part to continue to pay the annuity to the trustees. But except in that event his liability continues. Surely it would be a strange result that, as my Lord pointed out, the husband could release himself from liability by such misconduct as would justify his wife in applying for a divorce. It might be

1873

CHARLESWORTH v. HOLT.

said indeed that in such a case she would elect to apply at the risk of losing the benefit of this covenant. But we ought not, in the absence of express words, so to construe the covenant as to deprive the wife of the benefit of it unless she consents to allow her husband's misconduct to pass unnoticed.

I should add that I do not think the case of *Worsley* v. *Worsley* (1) can be relied upon by the plaintiffs in support of their argument, as this deed is dated prior to the passing of 22 & 23 Vict. c. 61, s. 5, and I am not prepared to hold that that enactment applies to any deeds except those executed after it was passed.

PIGOTT, B. I am of the same opinion. We cannot imply the term contended for by Mr. Holker, and although there are expressions in the deed which indicate that neither party contemplated the dissolution of the marriage, I do not think that upon dissolution the defendant's liability was at an end. He covenants to pay this annuity absolutely so long as he and Lucy Holt live apart. Their coming together again is the only event on which the payment is to cease.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Edwards, Taylor, & Jaques.*
Attorney for defendant: *Joseph Reed.*

Nov. 25

PRETTY *v.* NAUSCAWEN AND ANOTHER.

Practice—Notice of Trial—Taking short Notice of Trial "if necessary"—Meaning of "if necessary."

Where a defendant is under terms to take short notice of trial "if necessary," the plaintiff is entitled to give such notice if he cannot, using reasonable diligence, give full notice, although the regular course of pleading was not such as to render short notice necessary.

THIS was a rule to set aside a verdict for the plaintiff, on the ground (among others) that there had been no valid notice of trial. The action was in trover for a yacht, and the declaration was delivered on the 13th of June last. The defendants obtained

(1) Law Rep. 1 P. & M. 648.

three several orders for time to plead, and on the 5th of July they obtained a further order, giving them till noon on the 7th of July, on the terms of their "pleading issuably, rejoining gratis, and taking short notice of trial if necessary for the next assizes." The venue in the action was Kent, and the commission day at Maidstone being the 21st of July, the last day for giving full notice of trial was the 11th of July. The defendants, complying with the order, delivered their pleas on the 7th, but the plaintiff did not deliver replication until the 14th, and with it he gave short notice of trial for the assizes at Maidstone. The defendants' attorney informed the plaintiff's attorney that this notice was irregular, and would not be attended to. The case was accordingly taken as undefended, and a verdict passed for the plaintiff.

A member of the firm of attorneys who acted for the plaintiff filed an affidavit to explain the delay in delivering the replication and notice of trial. In it he said that on receipt of the pleas he sent them at once to a pleader, and continued: "I was not able to get back the replication from him until too late to deliver the same on the 11th day of July last, which was the last day for giving full notice of trial, but I delivered the same on the following Monday, the 14th day of July last, and the same was sent out in time to be, and was, I believe, delivered to the defendants' attorneys before two o'clock in the afternoon of that day." Other affidavits were used, to which it is unnecessary to refer, disclosing circumstances which it was submitted entitled the defendants to a new trial.

Willis shewed cause, and cited *Drake* v. *Pickford.* (1)

Day, Q.C., and *W. G. Harrison*, in support of the rule, argued that the words "if necessary," must mean, if the course of pleading rendered the short notice necessary. Here the plaintiff had four days in which he could have replied, and as that was the time in which he might have been ruled to reply, it must be taken to be sufficient, and the short notice was not good. This would make a fixed rule, but if any other rule were adopted, the attorney for the defendant would never know when he delivered

(1) 15 M. & W. 607.

1873

PRETTY v. NAUSCAWEN.

pleas whether he must make ready for the trial or not. The plaintiff could have given the ten days' notice, and should have done so: *Flowers* v. *Welch.* (1)

THE COURT (Kelly, C.B., Bramwell and Pollock, BB.) held that the rule laid down by Alderson, B., in *Drake* v. *Pickford* (2) was correct. The term "if necessary," must be taken to mean "if the plaintiff, using reasonable diligence, cannot give full notice," and was not to be construed solely with reference to the course of pleading. In this case reasonable diligence was used, and the notice was therefore sufficient. The affidavits, however, disclosing facts entitling the defendant to a new trial, the rule would be made absolute on payment of costs.

Rule absolute.

Attorneys for plaintiff: *Evans, Laing, & Eagles.*
Attorneys for defendant: *Clarke, Son, & Rawlings.*

(1) 9 Ex. 272; 23 L. J. (Ex.) 7. (2) 15 M. & W. 607, at p. 608.

END OF MICHAELMAS TERM, 1873.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXVII VICTORIA.

TOWNE *v.* COCKS.

1874
Jan. 23.

Interrogatories—Discovery of Title—Character of Defendant's Title—Quality of his Possession—Tithe Rent-charge—Apportionment Agreement—6 & 7 *Wm.* 4, *c.* 71.

Where the defendant's title to a hereditament is in controversy, interrogatories as to the character of his title and the quality of his possession will be allowed, although interrogatories as to the mode in which he proposes to prove his title would be inadmissible.

The plaintiff, who was the rector of a parish, claimed in an action for money had and received against the patron of the living, one half of the rent of the churchyard and of the tithe rent-charge which had been received by the patron since the plaintiff's induction. The defendant having pleaded a title by prescription, and also, as to the rent-charge, an agreement under 6 & 7 Wm. 4, c. 71, whereby it was agreed that the tithes should be commuted, and that the substituted rent-charge should be received in equal shares by the then rector and himself, the plaintiff was permitted to administer interrogatories as to the period for which the defendant and his predecessors had received the rent and tithes, or tithe rent-charge, and as to the circumstances under which they had so received them.

THIS was a rule calling on the plaintiff to shew cause why an order of Martin, B., allowing certain interrogatories, should not be varied or rescinded.

1874

TOWNE v. COCKS.

The declaration was for money had and received, and the plaintiff, who was rector of the parish of Middleton St. George, sought to recover from the defendant, who was patron of the living, one half of the rent of the churchyard and of the tithe rent-charge which had been, as it was alleged, wrongfully received by the defendant since the induction of the plaintiff. The defendant pleaded, among other pleas, a title by prescription to the half of the rent and rent-charge in question; and as to the rent-charge, he also pleaded an agreement between one of the plaintiff's predecessors, himself, and the other landowners of the parish, duly made and confirmed, under the Tithe Commutation Act (6 & 7 Wm. 4, c. 71), whereby a rent-charge was substituted in lieu of tithes and directed and agreed to be paid in equal shares to the plaintiff's predecessor and himself. Upon a summons to administer interrogatories, Martin, B., allowed the following amongst others:—

"(2.) At the time you became patron of the said rectory or living of Middleton St. George, who was the rector thereof? Did you at the time of your becoming patron as aforesaid, or immediately, or when afterwards, receive one half, or any other, or what portion of the rent or moneys derived from the letting of the churchyard of the said parish, or one half, or any, and what portion of the produce, or value of the produce of the said churchyard? If yea, state for how many years, and from whom, and under what circumstances, and by what authority you have received the same. Set forth a full account of the sums of money, or of the amount of the produce or value of the produce you have so received, and the date or dates of such receipt or receipts of such moneys, produce, or value of produce.

"(3.) Did you, at the time of your becoming patron of the said living, or immediately or when afterwards, receive one half, or any other and what portion of the tithes or tithe rent-charge paid in the parish? If yea, state for how many years, and from whom, and under what circumstances, and by what authority you have received the same. Set forth a full account of the tithes, or sums of money in respect of tithes or tithe rent-charge you have so received, and the date or dates of such receipt or receipts, and state if any and what tithes or portion thereof were received by

you before the tithes were commuted, and from whom and under what circumstances, and by what authority; and, before such commutation, to whom and under what circumstances did you pay or cause to be paid the tithes issuing and payable in respect of your own lands in such parish, and whether you paid the full tithes, or what proportion, and if a proportion, why a proportion? When did your ancestors and predecessors in title first receive the one half of the said tithes, and what were the names of such ancestors and predecessors, and when did they first respectively receive the same, and when did they respectively die? Were any, and which of them, laymen?"

Arthur Charles shewed cause. The defendant here sets up a prescriptive title, and also a title under an agreement with the plaintiff's predecessor, in pursuance of the Tithe Commutation Act (6 & 7 Wm. 4, c. 71). The plaintiff ought, therefore, to be allowed to inquire the period during which the defendant has been in possession of the rent of the churchyard and of the tithe rent-charge; and as to the latter, whether before commutation the defendant received half the tithe in kind. Interrogatories framed to elicit this information are not objectionable as seeking to discover the nature of the defendant's title.

[KELLY, C.B. The words "by what authority" in the interrogatories might make it necessary for the defendant to disclose, not only the character of his title, but the way in which he proposed to establish it.]

If that be so, the plaintiff would be content to strike out the words.

[POLLOCK, B., referred to *A.G. v. Corporation of London* (1), where a distinction is drawn between a discovery of the means of proving a title and of the character of the defendant's title, and the quality of his possession.]

These interrogatories, at all events if the words "by what authority" are omitted, are strictly in accordance with the rule laid down in that case where indeed a far more extensive discovery was ordered than is asked for here.

Crompton in support of the rule. The interrogatories are in

(1) 12 Beav. 8; 18 L. J. (Ch.) 314.

1874

TOWNE v. COCKS.

substance an inquiry into the defendant's title, and cannot be answered except by disclosing it. They are not relevant to the plaintiff's case, which is rested upon the fact that he is "rector" of the parish, and as such entitled to all the tithe and churchyard produce: and primâ facie he would no doubt be so entitled. In this case, however, the defendant proposes to shew, in answer, a prescriptive right to half the tithe and rent, and an agreement made thirty-seven years ago as to the rent-charge apportioned on the parish. In other words, he asserts that the plaintiff though nominally a "rector," is only rector as to half the profits of the living. Such a state of things is unusual, but not unique. There are several instances, especially in the North, of double rectories, one of which is spiritual and the other impropriate. The information asked for exclusively concerns the defendant's, and cannot be necessary for the plaintiff's case. As to so much of the third interrogatory as refers to the defendant's ancestors, that can only be answered by a disclosure of the contents of his title deeds.

[KELLY, C.B. Why so? You are only asked the names of your predecessors, and whether they in fact received the tithe.

PIGOTT, B. So far as the question cannot be answered except by disclosing your deeds, you might object to answer it. But that is no reason for disallowing the question.]

At all events, the interrogatories are too wide; and, if allowed at all, should be strictly limited to ascertain the character of the defendant's title, and should not require him to state his means of proof.

KELLY, C.B. I am of opinion that this rule should be discharged, the interrogatories being modified by striking out from each the words "by what authority." With this amendment they seem to me to be unobjectionable. The defendant would be entitled to object to answers as to the manner in which he intends to prove his title. But he cannot refuse, in such a case as the present, to disclose the period for which he has been in possession of the half of the churchyard rent and tithe rent-charge, and whether or not he or his predecessors were in receipt of the same proportion of the rent and tithe before the commutation agreement, upon which, in one of the pleas, reliance is placed.

1874

TOWNE v. COCKS.

PIGOTT, B. I think the learned judge was right in allowing these interrogatories, and—except by striking out the words "by what authority"—we ought not to vary his order. The defendant claims the half tithe rent-charge in question under an alleged tithe commutation agreement, made in the year 1837, between a deceased rector and himself. He also sets up a prescriptive right to the half of the tithe. Under these circumstances, I think the plaintiff is entitled to inquire into the time for which he and his predecessors have been in possession. The interrogatories as to the churchyard rent seem to me to be admissible upon similar grounds.

POLLOCK, B. I am of the same opinion. These interrogatories do not seek to discover the mode in which the defendant will endeavour to establish his title. They inquire into the character of that title, and the quality of the defendant's possession of the churchyard rent and tithe rent-charge. If the words "by what authority" were to remain, the interrogatories might possibly be considered as infringing upon the rule that one party cannot have a discovery of his adversary's title. But with the suggested variation, to which the plaintiff has expressed his readiness to submit, I see no objection to them.

Rule discharged.

Attorneys for plaintiff: *Le Riche & Son.*
Attorneys for defendant: *Clarke, Son, & Rawlins.*

BIBL. LONDIN UNIV.

1874
Jan. 27.

MARTIN *v.* SMITH.

Landlord and Tenant—Occupation under void Demise—Terms applicable to a yearly Tenancy.

10 QBD 466

By an agreement not under seal, the plaintiff agreed to let to the defendant, and the defendant to take of the plaintiff, a house and premises for seven years, upon the terms (amongst others) that the defendant would, in the last year of the term, paint, grain, and varnish the interior, and also whitewash and colour. The defendant entered under the agreement, and occupied and paid rent during the whole period of seven years. In an action for not painting, &c., the interior, and whitewashing and colouring in the seventh year:—

Held, that the defendant must be taken to have occupied on the terms that, if he should continue to occupy during the whole period of seven years, he would do those things which were by the agreement to be done in the seventh year; and that he was therefore liable.

DECLARATION, that by an agreement of the 15th of February, 1866, the plaintiff agreed to let to the defendant, and the defendant agreed to take from the plaintiff, a dwelling-house and premises upon the following terms (amongst others), viz.: Term, seven years from Lady Day, 1866; rent, 50*l.*, payable quarterly; tenant to pay all rates and taxes (except property tax); also to maintain the said house and premises in repair, together with all drains, &c., and leave them in repair at the end of the term; also to paint two coats, and grain, and twice varnish the interior, in the last year of the term, with the best materials and workmanship, also whitewash and colour; that the defendant, pursuant to the said agreement, entered into and upon the said house and premises, and held and occupied the same as tenant from year to year thereof, subject to the aforesaid terms, or such of them as were applicable to the said tenancy, during the whole term or period of seven years aforesaid, which expired before action, viz., on March 25, 1873; and all conditions, &c.; yet the defendant did not, during the said tenancy, maintain the said house and premises in repair, together with all drains, &c.; nor did the defendant leave them in repair at the end of the said tenancy; and, secondly, the defendant did not paint two coats and grain and twice varnish the said interior in the last year of the tenancy with best materials and workmanship, nor did the defendant whitewash and colour as aforesaid.

Demurrer to the second breach and joinder.

English Harrison, in support of the demurrer. The agreement is in words of present demise, and, being for a longer term than three years, is void under 8 & 9 Vict. c. 106, s. 3; and the only obligation on the defendant was such as arose out of the tenancy from year to year which was created by his occupying and paying rent, applying to that tenancy such of the terms of the agreement as were applicable to a yearly tenancy. But this term is not so applicable, for it is not to be performed in each year of the tenancy, but only in the seventh year of a term which the parties intended to create, but which was in fact never created. On this ground *Beale* v. *Sanders* (1) may be distinguished.

E. Clarke, contrà. The agreement, though void as a lease, was a good agreement, and might be enforced in equity: *Parker* v. *Taswell* (2); and its terms were adopted by the conduct of the parties, and applied to the tenancy which was in fact created, so far as they were not inconsistent with it. A term may be so inconsistent with a yearly tenancy as to be inapplicable; as, for instance, a term requiring a two years notice to be given: *Tooker* v. *Smith* (3); but there is no such inconsistency in the parties agreeing that, if the relation of landlord and tenant shall continue for the whole period contemplated, the tenant or the landlord will do certain acts or pay a sum of money: *Tress* v. *Savage* (4); *Digby* v. *Atkinson* (5); *Pistor* v. *Cater*. (6) The word "term" is not to be interpreted in a strict sense, but signifies the period of seven years during which the tenancy was to last: *Bowes* v. *Croll*. (7)

E. Harrison, in reply.

KELLY, C.B. I am of opinion that the plaintiff is entitled to judgment. An agreement has been entered into between the plaintiff and the defendant, with words of present demise, for a tenancy of certain premises for a term of seven years; the rent was to be payable and certain acts were to be done in each year, and in the last year of the term the tenant was to do certain

(1) 3 Bing. N. C. 850.
(2) 2 De G. & J. 559; 27 L. J. (Ch.) 812.
(3) 4 H. & N. 732.
(4) 4 E. & B. 36; 23 L. J. (Q.B.) 339.
(5) 4 Camp. 275.
(6) 9 M. & W. 315.
(7) 6 E. & B. 255.

1874

MARTIN v. SMITH.

painting and colouring beyond the annual repairs. The agreement being void at law as a lease under 8 & 9 Vict. c. 106, s. 3, but the tenant having entered into possession and having occupied and enjoyed the premises during the whole period, the question is, what are the liabilities of the tenant under the agreement coupled with this occupation and enjoyment. It is now clearly settled that when a tenant enters under an agreement for a term which is void at law, he is liable as a tenant from year to year, on all the terms of the agreement applicable to a yearly tenancy. It may be suggested, indeed, that the agreement being void at law there was no consideration for such a promise as the plaintiff contends for; but *Parker* v. *Taswell* (1) has decided that such an agreement, though void as a lease, is good and valid as an agreement, and may be enforced in equity by a decree for specific performance. This agreement, then, being capable of being enforced, there was a good consideration for the promises of the parties. The question, then, is whether the term of the agreement that the tenant should paint during the last year of the term of seven years is applicable to a tenancy from year to year which has, in fact, continued during the whole of that period; and it appears to me that, although during that period the defendant was only tenant from year to year, and his tenancy might at any time have been determined by a half year's notice to quit, yet his occupying under the agreement amounted to a promise that, if he should continue to occupy for the entire term, he would perform what was by the agreement to be performed in the last year of that period. In *Tress* v. *Savage* (2) where there was an agreement in words of present demise, dated the 17th of December, for a tenancy to commence on the 25th of December, and the question was, whether the tenant was entitled to a half year's notice to quit at the end of the three years, the effect of the occupation under the agreement was held to be that the tenant "has not a lease nor a tenancy for three years and a week, but a tenancy from year to year, which, during that time, is determinable by half a year's notice. If he stays to the end of the time, then by the agreement of both parties he goes out without notice." I think

(1) 2 De G. & J. 559; 27 L. J. (Ch.) 812. 4 Jur. (N.S.) 1000

(2) 4 E. & B. 36; 23 L. J. (Q.B.) 339. 18 Jur. 680

that case is not distinguishable in principle from the present, and our judgment must therefore be for the plaintiff.

PIGOTT, B. I am of the same opinion. The agreement contemplated a term of years, and *Parker* v. *Taswell* (1) decides that such an agreement is void only as a lease, but that it is valid and may be acted on and enforced as an agreement. Therefore the defendant was not merely tenant from year to year during his occupation, but he had a right at any time to enforce specific performance of the agreement, and turn it into a lease. There is, therefore, nothing to prevent us from giving effect to the intention of the parties, by holding that the stipulation as to painting in the last year of the period of seven years, if he should remain tenant so long, was one of the terms under which the defendant occupied those premises.

CLEASBY, B. I am of the same opinion. Although the word "term" is used in the agreement, we are not bound to construe it in its technical sense, but as meaning space or period of time, as was done in *Bowes* v. *Croll* (2), where Crompton, J. says: "It is argued that they (the defendants) must occupy for a 'term' of five years, and that this means a term created by a lease. I think that is a narrow construction. We have the authority of the Court of Common Pleas, in *Wood* v. *Copper Miners Co.* (3), that in a similar case the words 'term of twelve years' and 'term aforesaid' do not mean the term to be created by the lease in the technical sense of the expression, but that the true meaning of the word 'term' there is 'period' or 'space of time.'" Those words are entirely applicable to the present case, and in deciding for the plaintiff we are giving effect to the obvious intention of the parties.

Judgment for the plaintiff.

Attorneys for plaintiff: *Harper, Broad & Battcock.*
Attorney for defendant: *Webb.*

(1) 2 De G. & J. 559; 27 L. J. (Ch.) 812.
(2) 6 E. & B. 255, at p. 265.
(3) 14 C. B. 428, at p. 467; 17 C. B. 561; 23 L. J. (C.P.) 209; 24 L. J. (C.P.) 34.

1874
Jan. 30.

LORD *v.* PRICE.

Trover—Action by Purchaser for Goods subject to Vendor's Lien for unpaid Purchase-money.

The purchaser of goods which remain in the possession of the vendor subject to the vendor's lien for unpaid purchase-money cannot maintain an action of trover against a wrong-doer.

ACTION of trover tried in the Passage Court, Liverpool, on the 8th of November, 1873. The plaintiff, on the 15th of August, bought at an auction two lots of damaged cotton, part of the salvage from a fire, under conditions which, so far as is material, were as follows:—

"2. All the cotton, as allotted, is to be at purchaser's risk as to fire, theft, disarrangement of lots, or loss in any respect, from the falling of the broker's hammer, and to be taken away before Saturday next, the 16th instant, at four o'clock, p.m.; and if any should remain after that time, the cotton remaining will be sold, without notice, the deposit forfeited, and the loss (if any) to be made good by the defaulter.

"3. A deposit of 50*l.* per heap and 10*l.* per lot to be paid at the time of sale of each lot, and payment of the balance in cash, less 1½ per cent. discount, to be made immediately after at the broker's office, and before delivery of the cotton."

The plaintiff paid the deposit on the two lots, but did not pay the residue of the purchase-money, and left the cotton in the field where the auction had been held.

On the same day he removed one of the lots; but on going on the 18th of August to fetch the other lot, he found that it was gone. It had, in fact been taken by the defendant, who was also a purchaser at the sale, by mistake for a lot which had been bought by him, and the plaintiff (whose purchase-money was still unpaid) now sued him for the alleged conversion.

The learned assessor, on the defendant's application, nonsuited the plaintiff, on the ground that the vendor's lien for unpaid purchase-money prevented him from maintaining an action of trover, and gave leave to the plaintiff to move the Court of Exchequer for a new trial. A rule having been obtained accordingly,

1874

LORD v. PRICE.

Gully shewed cause. In order to maintain this action the plaintiff must have the right to present possession. But the plaintiff has no such right. It is true that the property in the goods passed to him, but the vendor's lien for unpaid purchase-money deprived him of the right to possession, which the vendor retained: *Bloxam* v. *Sanders* (1); *Milgate* v. *Kebble*. (2) The owner, therefore, could have maintained an action against the defendant, and the plaintiff cannot, for it cannot be that both can sue. Similarly a mortgagee under a bill of sale of chattels, of which the mortgagor is to remain in possession until default in payment, cannot maintain trover for them: *Bradley* v. *Copley* (3); nor a landlord for chattels leased to a tenant: *Gordon* v. *Harper*. (4) The plaintiff's remedy is not in this form of action, but by a special action for injury to his interest in the goods, as in *Mears* v. *London and South Western Ry. Co.* (5) This course would secure the rights of all parties, but if the plaintiff can recover without paying for the goods, the vendor's lien will be lost. Possibly also, by now paying or tendering the price, the plaintiff might entitle himself to recover in trover. In any case he is not without remedy, for he may treat the vendor as his trustee, and, on giving an indemnity, sue in his name.

Myburgh, in support of the rule. It is true the plaintiff has no right to present possession as against the vendor, but the vendor's right is for his own benefit, and the defendant, who is merely a wrong-doer, cannot take advantage of it.

BRAMWELL, B. I am of opinion that this rule must be discharged, on the ground that the action cannot be maintained without a right of present possession in the plaintiff. Here there is no evidence that the plaintiff had any right of possession; that right was in the vendor, who was entitled to retain possession of the goods until the balance of the purchase-money was paid, and, on non-payment, to resell the goods and recoup himself for any loss sustained on the re-sale. Therefore, if the goods were tortiously removed (and there is no evidence that the vendor assented

(1) 4 B. & C. 941, at p. 948.
(2) 3 M. & G. 100.
(3) 1 C. B. 685.
(4) 7 T. R. 9.
(5) 11 C. B. (N.S.) 850; 31 L. J. (C.P.) 220.

1874

LORD v. PRICE.

to their removal) it is manifest that the vendor could have maintained an action. But it cannot be that two men can be entitled at the same time to maintain an action of trover for the same goods. It is, therefore, abundantly manifest that the vendor could, and that the plaintiff cannot, maintain this action.

Whether, by paying the balance of the price now, or tendering it, the buyer can, either in an action of trover or by a special action on the case, have any remedy at Common Law in his own name, or whether he is limited to an action in the name of the vendor, it is not necessary now to pronounce. It is sufficient to say that, on the facts shewn here, the plaintiff cannot recover.

AMPHLETT, B. I am of the same opinion. I should be sorry to suppose that the plaintiff could have no remedy. No doubt, on paying the balance he would be entitled to relief, either at law or in equity. But it is sufficient to say here that he has not done those acts which were necessary to entitle him to the possession of the goods, and that he cannot therefore maintain this action.

Rule discharged.

Attorneys for plaintiff: *Lowndes & Co., Liverpool.*
Attorney for defendant: *Lupton, Liverpool.*

LANGTON *v.* CARLETON.

1873
Nov. 19.*

Master and Servant—Service for "Twelve Months certain"—Notice—Continuance of Service beyond the Twelve Months.

The defendant agreed to serve the plaintiff as a traveller and agent "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice":—

Held (by Bramwell and Pigott, BB., Kelly, C.B., dissenting), that at the close of the twelve months the agreement could be determined by either party without any notice, and that the stipulation as to a three months' notice only applied in case the engagement was prolonged beyond the twelve months.

SPECIAL CASE.

By an agreement dated the 23rd of January, 1871, between the plaintiff and his partner H. P. Burrows (since deceased), of the one part, and the defendant of the other part, it was agreed (among other things), first, that the defendant should faithfully serve the plaintiff and Burrows, so long as the agreement was in force, by travelling and obtaining orders for ale, &c., and receiving and collecting moneys due to them in and about London, and otherwise acting for them as agent and traveller; secondly, that the defendant would not during the continuance of the agreement take orders for ale, &c., for any other firm, and that for his services the plaintiff and Burrows should pay the defendant 200*l.* a year and a 10 per cent. commission; and thirdly, that the agreement should be "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving to the other a three months' notice in writing of his desire so to do;" and that if the plaintiff and Burrows should desire to terminate the agreement without notice, after twelve months and before any notice should have expired, they might do so upon paying the defendant 50*l.*

The defendant entered the service upon these terms, and acted during the year 1871. On the 7th of December, 1871, he received from the plaintiff and Burrows a notice that they should not require his services after the 23rd of January, 1872. On the 5th of February the plaintiff (Burrows being then deceased), commenced this action for a debt of 91*l.* 18*s.* 7*d.*, alleged to be due

* Decided in Michaelmas Term, 1873.

1873

LANGTON v. CARLETON.

from the defendant to the plaintiff under the above agreement. The defendant, who did not dispute the debt, pleaded a set off of 50*l.*, which he insisted was due to him as liquidated damages in lieu of a regular notice to quit the plaintiff's service.

The question for the opinion of the Court was whether the defendant was entitled to this set off.

Holl, for the plaintiff. The agreement is for twelve months "certain," and either party could put an end to it at the end of the twelve months, without notice: *Thompson* v. *Maberly* (1); *Brown* v. *Symons*. (2) The parties may have contemplated the engagement continuing; but unless it was continued, no notice was necessary. The plaintiff gave a notice, but that was superfluous. The claim for liquidated damages, therefore, cannot be sustained.

Jelf (*Bulley* with him), contrà. The servant here was entitled to a three months' notice. If the service had lasted as both parties originally contemplated, beyond the twelve months, such a notice would have been necessary, and it is not reasonable to suppose that either party could withdraw at the end of the twelve months, abruptly and without any notice whatever. The service was to be for twelve months "certain," and therefore could not be terminated within that period by any notice. Nor, upon the fair construction of it, could it be terminated at the end of the twelve months without a three months' notice. The words "after which time," should be construed as "after, or at the expiration of which time." The defendant is therefore entitled to the set off which he claims.

Holl, in reply.

KELLY, C.B. I think the defendant is entitled to our judgment. He was dismissed at the expiration of the first twelve months of his engagement without a three months' notice, and that being so, he is entitled, in my opinion, to set off 50*l.* under the language of the agreement. It is contended that the true construction of the agreement is, that it was an engagement for twelve months certain, at the expiration of which either party might determine it without

(1) 2 Camp. 573. (2) 8 C. B. (N.S.) 208; 29 L. J. (C.P.) 251.

6 Jur. N.S. 1079

notice at all. But that does not commend itself to me as a correct or reasonable contention. The agreement contemplates, I think, a continuance of the service beyond the twelve months. Within that time it could not be terminated by notice at all, nor, as it seems to me, at the close of that period, without a three months' notice.

BRAMWELL, B. I entertain a view differing from that just expressed by my Lord. The agreement is difficult to construe, but it must, I think, mean one of two things: either an agreement for twelve months certain, to expire without notice at all at the end of the twelve months, and then to continue, if the parties so please, until terminated by a three months' notice; or it is an agreement for twelve months, and for some time after, until determined by a three months' notice. This would, in fact, make it an agreement for fifteen months at the least. I prefer the first construction, for otherwise I do not see that any meaning is given to the words "twelve months certain." In my opinion, therefore, notwithstanding the ingenious argument of Mr. Jelf, the plaintiff is entitled to the judgment of the Court. There was no necessity to give any notice within the twelve months. The clause as to notice only applies in case the parties do in point of fact prolong the engagement.

PIGOTT, B. I concur with my Brother Bramwell in this case. This is a special contract, and not an ordinary yearly hiring for twelve months certain, and then from year to year, until determined by notice. The parties no doubt contemplated an engagement which might last longer than one year, and if it did, then it was to be terminated by a three months' notice. But the necessity for a notice only arises in case the first year has expired. At the end of that year, either party could, in my opinion, put an end to the agreement without any notice at all. My judgment, accordingly, is for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Dod & Longstaffe.*
Attorneys for defendant: *Buckley, Millard, & Cayley.*

1874
Feb. 7.

[IN THE EXCHEQUER CHAMBER.]

MARCHANT *v.* THE LEE CONSERVANCY BOARD.

Pension to Public Servant—Power to vary Pension—Lee River Navigation Improvement Act (13 & 14 *Vict. c. cix.*).

By the Lee River Navigation Improvement Act, 1850, s. 76, it is enacted that "it shall be lawful for the trustees from time to time to pay and allow to any officer or servant of the trustees whose services may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case may, in the judgment of the trustees, be reasonable and proper," and to pay the same out of moneys in their hands by virtue of their special Acts: Under this section the trustees, by resolution not under seal, granted to their clerk upon his resignation of his office, an annuity of 300*l.* a year:—

Held (reversing the decision of the Court below), that the trustees were entitled afterwards to reduce the amount of the annuity.

Error from the judgment of the Court of Exchequer, in favour of the plaintiff, upon a special case; reported, Law Reports, 8 Ex. 290, where the facts are fully stated.

The question raised by the case was, whether the defendants, who had, under the Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv.), succeeded to the rights and obligations of the Trustees of the Lee Navigation, had power to reduce from 300*l.* to 150*l.* an annuity granted by the trustees in 1865, by resolution not under seal, to the plaintiff, their clerk, upon his resigning his office.

The plaintiff had been appointed to his office in 1825, under 7 Geo. 3, c. 51, s. 76, by which the officers appointed by the trustees "shall be from time to time removeable at the will and pleasure of the said trustees or any seven or more of them." There was no power under that Act of granting a pension, the funds of the trustees being by s. 84 applicable to certain defined purposes (not including such a grant) "and to no other use or purpose whatsoever;" but by 13 & 14 Vict. c. cix., s. 76 (set out in the head-note), the trustees were authorized to grant annuities to retiring servants. The annuity which was granted to the plaintiff under this section in 1865 was, by a resolution of the defendants, passed on the 16th of February, 1872, reduced to 150*l.* in consequence of a falling off in the funds.

Upon a special case, stated in an action brought to recover the difference between the quarter's allowance paid to the plaintiff under the second resolution and the amount which he would have received under the first, the court below gave judgment for the plaintiff; and the defendants brought error.

J. Brown, Q.C. (*Barnard* with him), for the defendants. There is nothing in the resolution of the 11th of March, 1865, to prevent the trustees from reconsidering the matter. Under the earlier statute, 7 Geo. 3, c. 51, they could not have granted a pension, the funds being appropriated by s. 84 to defined purposes, of which this was not one. The later Act, 13 & 14 Vict. c. cix. s. 76, only conferred on them a power; it imposed no obligation to grant a retiring pension to the plaintiff, or even to entertain his application; what they did was a mere bounty, which they were at liberty to discontinue altogether, or to vary at discretion. The words of 13 & 14 Vict. c. cix. s. 76, "from time to time," indicate that their power is not exhausted. Neither was there any bargain; nor, if there had been one, was there any consideration to support it. By 7 Geo. 3, c. 51, s. 76, under which the plaintiff was appointed, he was removeable at the will and pleasure of the trustees; the pension, therefore, could not have been granted in consideration of his resigning. It is doubtful whether the trustees, who were a public body, could have bound their successors even by a grant of a pension under seal; but it is unnecessary to contend for that proposition.

Benjamin, Q.C. (*Hayman* with him), for the plaintiff. The application of the plaintiff was not an application to the mere bounty of the trustees, it was a claim of right that they should perform the duty imposed on them by the 13 & 14 Vict. c. cix. s. 76, of considering and determining on the question whether they should grant a pension, and what the amount of it should be. The case of misconduct being specially excepted in the section, there is ground to contend that the trustees were bound to grant a pension in any other case; but at least they were bound then to consider and to exercise their judgment as to what they would do; and having then exercised their judgment, their determination was final, and could not be afterwards altered even by themselves, still

1874

MARCHANT v. LEE CONSERVANCY BOARD.

less by their successors, who were incompetent to judge of the reasons which governed their decision. This is therefore an irrevocable grant under the statute. But further, the plaintiff must be considered, after the passing of 13 & 14 Vict. c. cix., to have continued in the service of the trustees on the terms that, if he should resign without misconduct the trustees would pay him such sum, whether by way of annuity or otherwise, as they, in the fair exercise of their judgment, should determine. Therefore when, in consideration of his past services performed at their request, and of his resignation, the trustees resolved to pay him the pension in question, a binding contract on them to pay it was created. [He referred to s. 56 of the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16, incorporated by 13 & 14 Vict. c. cix. s. 7), and to *Eastwood* v. *Kenyon* (1) and *Gibson* v. *East India Co.* (2)]

J. Brown, Q.C., in reply.

KEATING, J. I am of opinion that the judgment of the Court below in favour of the plaintiff (in which the Lord Chief Baron seems to have concurred with some hesitation) must be reversed. By the Act which originally constituted the corporation of the trustees of the river Lee, and under which the plaintiff was appointed to his office (7 Geo. 3, c. 51) it would not have been competent to the trustees to make him any retiring allowance or payment upon his leaving their service, because by s. 84 of that Act, all sums raised by the trustees were appropriated to certain defined purposes, of which this was not one. But by 13 & 14 Vict. c. cix. s. 76, power was given to them to "pay and allow to any officer or servant of the trustees whose services may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case may, in the judgment of the trustees, be reasonable and proper," which annuity or allowance they were authorized to pay out of the moneys coming to their hands under their special Acts. In 1865, the plaintiff having been clerk to the trustees for forty years, and being from age and ill health unable any longer to perform his duties, he applied to the trustees to

(1) 11 A. & E. 438. (2) 5 Bing. N. C. 262.

appoint his son in his place, and solicited their favourable consideration of his past services. The trustees acceded to these requests, and passed a resolution "that his resignation be accepted, and that a retiring pension of 300*l.* per annum, free of income tax, be granted to him during the remainder of his life." The plaintiff received the pension for several years, until, the funds falling off, it became necessary, in the judgment of the defendants, who had in the meantime succeeded to the powers and obligations of the trustees, to reconsider the amount, and they accordingly varied the resolution by reducing the pension to 150*l.* per annum. The question is, whether they had power to vary the previous resolution, and I think they clearly had that power. It is unnecessary to consider what would have been the case if the trustees had made a grant of an annuity under seal, or by a valid contract founded on a good consideration; there was here neither the one nor the other. It is argued indeed that the resolution was binding as a grant, because the 76th section of 13 & 14 Vict. c. cix. imposed an obligation on the trustees to exercise their judgment, and that having once exercised that judgment, it could not be subsequently varied; but from that construction of the section I entirely dissent; it conferred a power upon them, but it imposed no obligation. It is also argued that the resolution evidenced a contract founded on good consideration between the plaintiff and the defendants; but I can find no evidence of any such contract. The resolution conferred a mere bounty on the plaintiff; the elements of a contract are entirely wanting. The trustees no doubt intended that the plaintiff should be provided for during the remainder of his life, not anticipating a deficiency in the funds, but there was nothing to deprive them of the power of reconsidering their resolution.

GROVE, QUAIN, ARCHIBALD, and HONYMAN, JJ., concurred.

Judgment reversed.

Attorneys for plaintiff: *Taylor & Arnold.*
Attorney for defendant: *R. J. Pead.*

1874
Feb. 11.

[IN THE EXCHEQUER CHAMBER.]

SMITH *v.* FLETCHER AND OTHERS.

Trespass—Duty of Landowner—Collecting Water—Mining.

The defendants' mines adjoined and communicated with the plaintiff's; and in the surface of the defendants' land were certain hollows and openings, partly caused by and partly made to facilitate the defendants' workings. Across the surface of their land there ran a watercourse, which, in the year 1865, was diverted by them into another channel. In November, 1871, the banks of the watercourse (which were sufficient for all ordinary occasions) burst in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks passed into the defendants', and so into the plaintiff's, mines. If the land had been in its natural condition the water would have spread itself over the surface and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines.

At the trial of an action brought by the plaintiff to recover the damage he had sustained, the learned judge directed a verdict for the plaintiff, holding that the case was governed by *Fletcher* v. *Rylands* (Law Rep. 3 H. L. 330) and that the defendants were absolutely liable; and rejecting evidence offered by the defendants that every reasonable precaution had been taken to guard against ordinary emergencies:—

Held (reversing the judgment of the Court below), that the case was not beyond all question governed by *Fletcher* v. *Rylands* (Law Rep. 3 H. L. 330), that the water coming from the natural overflow and that coming from the diversion of the watercourse might possibly admit of different considerations; that if the evidence tendered had been received, there might have been questions for the jury, and that under all the circumstances there ought to be a new trial.

The opinion of the jury at such trial ought to be taken as to whether what was done by the defendants was done by them in the ordinary, reasonable, and proper mode of working the mine.

APPEAL by the defendants from a decision of the Court of Exchequer discharging a rule to enter a nonsuit, or for a new trial. The pleadings and facts are fully stated in the report in the Court below. (1)

Holker, Q.C. (*Kay, Q.C.*, and *Baylis* with him), for the appealing defendants. The defendants are not responsible. They did not make the openings and cuts on their land in order to store water,

(1) Law Rep. 7 Ex. 305.

and this renders the case of *Fletcher* v. *Rylands* (1) inapplicable. There the defendant made a reservoir to store water. Here the openings and cuts were made in the ordinary course of working the mine. There is no suggestion either of negligence on the defendants' part or of any abnormal mode of working. The water which did the mischief came during a heavy flood by gravitation. *Smith* v. *Kenrick* (2) is in point. The mischief in that case, as here, was caused by the ordinary process of working the mine, and although damage resulted to the plaintiff, it was held that the defendant was not responsible. In *Baird* v. *Williamson* (3) the distinction is drawn between water flowing by gravitation from one mine to another, and water sent by the active interference of the mine-owner. In respect of the latter he would be responsible.

[LORD COLERIDGE, C.J. The question before us seems really to be one of fact. Did this water come simply by natural causes into the plaintiff's mnes? If so, *Smith* v. *Kenrick* (2) would be applicable. Or, on the other hand, did the defendants, as the Court below seem to have thought, cause the water to come there? If they did, the ruling of the Court of Common Pleas in *Baird* v. *Williamson* (3), as to the water pumped to a high level, would apply.]

The proper inference to be drawn is, that the defendants did nothing actively to bring the water.

[LORD COLERIDGE, C.J. They made a "cut" from the bottom of one of the hollows, and also altered the channel of a watercourse.]

The watercourse was really improved and enlarged, and the defendants desired to give evidence of this, and also that they had taken all reasonable precautions to prevent damage. But the learned judge rejected evidence on both points, conceiving that *Fletcher* v. *Rylands* (1) governed the case. As to the "cut," that was analogous to the passage or "crut" made by the defendant in *Baird* v. *Williamson* (3) from one seam to another, and which it was held he was justified in making in the usual course of working. The working therefore being usual, and there being no negligence, the defendants were not liable for the consequences of an

(1) Law Rep. 3 H. L. 330; 18 L. J. (C. P.) 172.

(2) 7 C. B. 515.

(3) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101.

1874

SMITH v. FLETCHER.

extraordinary flood: *Carstairs* v. *Taylor* (1); *Tennent* v. *Earl of Glasgow*. (2)

Herschell, Q.C. (*Crompton* with him), for the plaintiff. The natural consequence of the defendants' act was to bring the water into the openings and hollows in their land, whence it flowed through the cut into the plaintiff's mines. It is true that the openings were not made on purpose to store water, but that cannot make any difference; the result is the same. *Smith* v. *Kenrick* (3) only decides that if subterranean water, collected in underground workings in the ordinary course of mining, escaped without the mine-owner's negligence, he would not be liable. But what may be called "mine water" proper is subject to different considerations from water collected on the surface of the land by quarrying.

[LORD COLERIDGE, C.J. We must take it that the defendants' workings, both underground and on the surface, were ordinary and usual.]

At all events they create a state of things on the surface, of which the necessary consequence is, that water will accumulate. The principle of *Fletcher v. Rylands* (4) therefore applies, and it was not necessary to prove any actual negligence. The defendants choose to collect what to their knowledge may do damage in certain circumstances, and if damage is done they are absolutely responsible: *Ruck* v. *Williams*. (5) *Baird* v. *Williamson* (6), so far as the third class of water is concerned, viz. the water raised by pumping, is in the plaintiff's favour. The defendants here, by making the cut and diverting the stream, did actually cause the water to flow into the plaintiff's mine, and it is no answer to say that if the stream had not been diverted more water would have overflowed.

Holker, Q.C., was not called on to reply.

LORD COLERIDGE, C.J. We concur with the Court below that it is impossible to enter a nonsuit, but we are further of opinion

(1) Law Rep. 6 Ex. 217.

(2) Court of Session Cases, 3rd Series, 133.

(3) 7 C. B. 515; 18 L. J. (C.P.) 172.

(4) Law Rep. 3 H. L. 330.

(5) 3 H. & N. 308; 27 L. J. (Ex.) 357.

(6) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101.

1874

SMITH v. FLETCHER.

that there ought to be a new trial. The case appears to us to have been stopped too soon. The learned judge seems to have been of opinion that the case was one in all respects within *Fletcher v. Rylands.* (1) We do not think that it was, in every respect or in every conceivable aspect, within that authority; and if evidence had been given on behalf of the defendants, we think there might have been questions for the consideration of the jury.

Again, the learned judge drew no distinction between the water which came from the new diversion of the stream and that which came from the natural overflow. We think that what may be called these two sets of water may admit of very different considerations.

As there is to be a new trial it is unnecessary to say more, except that we think it desirable that the opinion of the jury should be taken, as to whether what was done by the defendants was done in the ordinary, reasonable, and proper mode of working the mine.

KEATING, QUAIN, GROVE, ARCHIBALD, and HONYMAN, JJ., concurred.

Judgment reversed.

Attorneys for plaintiff: *Helder & Kirkbank.*

Attorneys for defendants: *Gregory, Rowcliffes, & Co., for Musgrave, Whitehaven.*

WHAITE *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Feb. 12.

Carrier—Carriers Act (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68), *ss.* 1, 2—"*Parcel or Package.*"

The plaintiff sent upon a truck by the defendants' line a waggon with wooden sides, but without a top, in which he packed, amongst other things, paintings exceeding the value of 10*l.*, which were so placed in the waggon that it could be seen that they were paintings, but their exact character could not be seen. In an action for injury to the paintings:—

Held, that the waggon, with its contents, was a "parcel or package" within the Carriers Act, s. 1, and that, the goods not having been declared, the plaintiff could not recover.

ACTION brought against the defendants to recover the value of goods of the plaintiff injured and destroyed whilst being carried

(1) Law Rep. 3 H. L. 330.

1874

WHAITE v. LANCASHIRE AND YORKSHIRE RAILWAY CO.

by the defendants for the plaintiff. The defendants paid 31*l.* into court in respect of some of the goods, and as to the rest pleaded that the goods were within 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, and were contained in a parcel or package exceeding the value of 10*l.*, and were not declared.

The cause was tried before Pollock, B., at Manchester, on the 23rd of December, 1873, and the facts proved were as follows:—The plaintiff, who was a decorator and exhibitor of fancy articles at Manchester, had sent to Wigan various articles, including decorations, models, mechanical figures, and oil paintings, for exhibition at the Wigan Infirmary Bazaar. On the closing of the exhibition these articles were packed in a waggon and a lorry for return. The oil paintings, which were ten in number, were placed in the waggon, the two middle ones being placed, with their faces inward, against the opposite sides of a frame shaped like an inverted V, and the remainder ranged in line behind the two first, and separated from each other and kept in place by strips of wood nailed to the floor. The waggon was open at the top, so that it could be seen that that there were pictures inside, but the character of the pictures could not be seen. The plaintiff and his foreman, in their evidence, described themselves as having "packed" the things in the waggon in this manner. The waggon and lorry were placed on two trucks on the defendants' line for conveyance to Manchester; the train in which they were met with a collision, and the contents of the waggon were greatly injured, the paintings in question, which were proved to be worth 100*l.*, being wholly destroyed. The plaintiffs paid a sum of 31*l.* into court in respect of the other goods; a further sum of 20*l.* for consequential damage in respect of them was agreed on at the trial; and a verdict was entered for the plaintiff for 120*l.*, with leave for the defendant to move to reduce the verdict to 20*l.*, on the ground that as to the paintings the defendants were protected from liability by the Carriers Act (1), no declaration having been made or insurance paid.

(1) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, provides that no "common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following, that is to say" (amongst other things), paintings "contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger . . . when the value of such article or articles or property aforesaid

A rule having been obtained accordingly,

1874

WHATE v. LANCASHIRE AND YORKSHIRE RAILWAY CO.

Holker, Q.C. (Ambrose with him), shewed cause, and contended that a waggon could not properly be described as either a parcel or a package; it was not sufficiently closed up, and it was of too large a size. The defendants were able to see what was inside, and so, without any declaration, had warning of its contents. The object of the statute was therefore secured, which was to protect carriers against incurring liabilities the extent of which they had no means of knowing.

R. G. Williams, Q.C. (Herschell, Q.C., with him), in support of the rule, contended that the pictures were described as packed, and were, in fact, packed in the waggon, and that anything packed was a package; that nothing could turn upon the size of the package, but that in fact the two words "parcel" and "package" appeared to be designedly used, the one to describe the smaller, the other to describe the larger kinds of packages, so that everything might be included; and that it was no answer that the goods, though practically covered up, were partially visible. The sender has to declare, and the carrier is entitled to know, not only the nature, but the value of the goods.

BRAMWELL, B. I think this waggon with its contents was a "package" within the meaning of the Act. Although one would not commonly describe it in that way, yet, looking at the object and purpose of the Act, I think we are not only entitled, but compelled to say that it was a "package or parcel" within the section. It is to be observed that the plaintiff himself and his foreman authorize us in so describing it, for they say they "packed" the goods in the waggon, and no one would doubt that this expression was

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contained in such parcel or package shall exceed the sum of 10*l.*," unless at the time of delivery "the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as is hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package"; and by s. 2, "when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed 10*l.*," the carrier may demand an increased rate of charge, to be notified as therein mentioned.

1874

WHAITE v. LANCASHIRE AND YORKSHIRE RAILWAY CO.

rightly used; but if so, then the waggon so packed with goods was a package. Further, the packed waggon had this quality of a package about it, that the pictures were so packed by the plaintiff that, though the defendants could see that there were pictures in the waggon, they could not see what was the exact character of the pictures, which the plaintiff's mode of packing concealed. The rule must, therefore, be made absolute to reduce the verdict to 20*l*.

CLEASBY, B. I am of the same opinion. It is tolerably plain that, if the plaintiff had declared the nature and value of the contents of the waggon, the defendants would have been entitled to charge an increased rate of freight under s. 2 of the Act; but this they could not do unless the waggon were a "parcel or package." If so, the plaintiff, not having declared, is prevented by s. 1 from recovering. It would be absurd to say that the waggon was too large to be a package; plainly, size cannot be a criterion.

POLLOCK, B. I am of the same opinion. The Act uses the words "parcel" and "package." Both words being used, this gives us some assistance in arriving at the meaning of what each signifies. I think that this was a package, if not a parcel. The plaintiff says, "I packed the goods in my four-wheeled waggon, which had wooden sides, but no top," which is much as if a man should say, "I packed my silver forks in a wooden box, but I could not put a top on it, because it was too full." That was clearly a parcel or package within the meaning of the Act; and the plaintiff, not having declared the value and nature of the contents, cannot recover.

Rule absolute.

Attorneys for plaintiff: *Edwards, Layton, & Jaques.*
Attorneys for defendants: *Clarke & Woodcock.*

RADLEY *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

1874
Feb. 7.

Contributory Negligence—Railway Bridge.

The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was crossed by a bridge, and on to which the defendants were in the habit of conveying the plaintiffs' trucks from their line, the plaintiffs removing them thence as they thought fit. The defendants brought on to the plaintiffs' siding and left there, after working hours, trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at plaintiffs' works, the defendants, after dark, pushed on to the siding other trucks of the plaintiffs, and pushed the loaded truck up to the bridge, by which means the train of trucks was arrested. The defendants' servants, not being aware of the cause of the obstruction, pushed the train of trucks forward with so much force that the loaded truck knocked down the bridge. In an action for the damage so done, the jury having found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck:—

Held, that there was no evidence of contributory negligence to go to the jury.

THIS was an action brought to recover damages from the defendants for injury done to a bridge upon the plaintiffs' siding, under circumstances which are fully stated in the judgment. The cause was tried before Brett, J., at the Liverpool Summer Assizes, 1873. The defendants contended that the evidence shewed contributory negligence in the plaintiffs, and this question being left to the jury by the learned judge, they found for the defendants. A rule having been obtained for a new trial on the ground that the learned judge misdirected the jury in telling them that there was evidence of contributory negligence in the plaintiffs,

Jan. 30. *Aspinall, Q.C.*, and *M'Connell*, shewed cause.

Herschell, Q.C., and *Baylis*, supported the rule, and referred to *Davies* v. *Mann* (1) and *Dimes* v. *Petley*. (2)

The arguments are fully noticed in the judgment delivered.

Cur. adv. vult.

Feb. 7. The judgment of the Court (Bramwell and Amphlett, BB.) was delivered by

(1) 10 M. & W. 546. (2) 15 Q. B. 276; 19 L. J. (Q.B.) 449.

1874

RADLEY v. LONDON AND NORTH WESTERN RAILWAY CO.

BRAMWELL, B. This is a case of very great complexity, not so much in the facts as in the considerations to which they give rise. So much so that we have thought it desirable to put our opinion in writing. The material facts are as follows:—The plaintiffs are colliery owners, who have sidings out of and on one of the defendants' lines; over these sidings is a bridge belonging to the plaintiffs, with a headway of eight feet. It has been the course of business between the plaintiffs and the defendants for the defendants to take from these sidings the plaintiffs' waggons loaded with coals and deliver or leave them at their destination; also to collect the plaintiffs' waggons when empty, and bring them to the sidings, and there leave them. When the waggons were so left on the sidings, the plaintiffs dealt with them as they thought fit, i. e. took them to the pit to be loaded in such order and at such times as they pleased, or took them to their workshops if they needed repair. On a certain Saturday, after working hours, when the men were gone and the plaintiffs could only move them as they might on a Sunday, i. e. by some special engagement of workmen, the defendants brought and left on one of the plaintiffs' sidings some empty waggons of the plaintiffs, and a waggon, empty except that it had on it a waggon of the plaintiffs which had broken down and could not travel, and had to be brought in this way to the plaintiffs. The waggon so loaded was, with its load, eleven feet high, and therefore could not pass under the bridge. It remained where so left. On the next Sunday night, after dark, the defendants brought in a very long train of the plaintiffs' empty waggons, and pushed it on the siding where this waggon, loaded with the disabled waggon, was. The waggon was pushed as far as the bridge. Had it been empty it would have passed underneath, and probably the defendants had often pushed waggons in this way under the bridge, though there was evidence to shew that they had been requested not to push things on the siding beyond a public highway, which was some distance before getting to the bridge in the direction in which the defendants brought the train of empty waggons. This is, perhaps, of no moment. But the waggon so loaded coming to the bridge and being unable to pass underneath it, the train stopped, and those who had charge of it, without looking to ascertain the cause of the stoppage, gave momentum to the engine to such an

extent that the waggon with its load knocked the bridge down. For this the action was brought.

It is needless to say there was evidence of negligence in the defendants, but the learned judge left it to the jury to say whether, and the jury did say that, there was contributory negligence in the plaintiffs, and found their verdict for the defendants on that ground. We have to say whether the learned judge was right in the way in which he dealt with this question of contributory negligence.

The plaintiffs contended, first, that there was no evidence of contributory negligence. The way the defendants put it was as follows: They said the plaintiffs knew, or ought to have known, that the loaded waggon had been brought and left at the place where it was so left; they knew it would not pass under the bridge; they knew that the defendants would, or might, bring empty waggons on the Sunday, and, to make room for what they brought, would, or might, push forward whatever they found on the siding, as they had done before; that therefore the plaintiffs ought to have moved the loaded waggon, or taken out the broken one, or warned the defendants it was there. The plaintiffs said, in answer to this, that, assuming they knew the waggon was there with the load, so did the defendants; that the defendants knew also the height of the bridge, and that the waggon with its load would not pass under it; that the defendants knew that working hours were over when they brought it, and that practically the plaintiffs could not move or unload it till Monday; and they said they had a right to suppose that the defendants would not be so negligent, under these circumstances, as to drive this loaded waggon at the bridge, under which it could not pass, and which it would knock down if pushed against it with sufficient force, the more especially as there was another unoccupied siding on which the empty waggons brought on the Sunday might have been put; that in truth the alleged negligence in the plaintiffs was, not foreseeing and guarding against the negligence of the defendants; that even if they themselves had placed the loaded waggon there, they had no right to anticipate that the defendants would be so negligent as to put any waggon on the siding without seeing what was there, and to push with such force as they did when they found an obstruction.

We think this reasoning correct, and, consequently, that there

1874

RADLEY v. LONDON AND NORTH WESTERN RAILWAY CO.

was no evidence of contributory negligence for the jury. Suppose the defendants had brought the loaded waggon on Sunday night, and pushed as they did, then there would clearly have been no contributory negligence; but how does that differ from the present case, unless it is supposed there was some duty in the plaintiffs to move the loaded waggon on the Saturday, or to give some notice?

The plaintiffs further contended, what perhaps is much the same thing differently put, that, according to *Davies* v. *Mann* (1), assuming there was negligence on their part, yet, if the defendants could have avoided doing the mischief by reasonable care, they were bound to do so; and the plaintiffs objected to the learned judge's summing-up, that this had not been left to the jury. This also seems well founded. There must, therefore, be a new trial.

Should the case be tried again, it might be as well to leave the question in this way to the jury, giving leave to the plaintiffs to move on the ground that there was no evidence of contributory negligence, should the jury find for the defendants.

Rule absolute.

Attorneys for plaintiffs: *Sharpe, Parker, & Pritchard, for Peace, Wigan.*

Attorney for defendants: *Blenkinsop.*

Feb. 5.

BLANCHET *v.* POWELL'S LLANTIVIT COLLIERIES COMPANY, LIMITED.

Action for Freight—Difference between Weight of Cargo shipped and Weight expressed in Bill of Lading—Estoppel—Foreign Bill of Lading—Contract made in France—Bills of Lading Act (18 & 19 *Vict. c.* 111), *s.* 3.

To an action for a lump sum for freight by the master of a ship against the indorsee of a bill of lading the defendants pleaded, except as to 217 tons of cargo, that by the bill of lading the plaintiff acknowledged himself to have received a number of tons exceeding 217 tons, and that he did not carry or deliver the goods in the bill of lading mentioned, but only a portion, to wit, 217 tons (not alleging in terms that he did not carry all the goods delivered). The plaintiff replied (3.) that he carried all the goods delivered to him under the bill of lading, and that the goods so delivered and described in the bill of lading as weighing more than

(1) 10 M. & W. 546.

217 tons in fact weighed 217 tons only, and that the weight mentioned in the bill of lading was a mere misdescription, inserted without fraud or default; (4.) that the bill of lading was made in France, and that, according to the law of France, the whole freight was payable, although part only of the goods was carried and delivered; and (5.) repeating the allegations of the third replication, and adding that the bill of lading was made in France, and that, according to the law of France, the whole freight was payable. On cross demurrers:—

Held, that the plea was ambiguous, but that, assuming it to be good, the third replication was a good answer to it, for that, in an action for freight, the master is at liberty (notwithstanding 18 & 19 Vict. c. 111, s. 3) to shew that the cargo actually received by him differs in weight from that signed for in the bill of lading, at all events where the weight mentioned in the bill of lading is mere matter of measurement; and that the freight being a lump sum the plaintiff was entitled to recover the whole.

Held also, that the fourth and fifth replications were good.

DECLARATION that one Paranque, at L'Orient, in the republic of France, delivered to the plaintiff a cargo of pit-wood, to be carried by the plaintiff in a ship from L'Orient to Cardiff, under a bill of lading dated the 2nd of January, 1874, signed for the same by the plaintiff, and there delivered (accidents and dangers of the sea excepted) to the holder of the bill of lading or his order, he or his assigns paying the plaintiff for freight the sum of 3441 shillings and 4*l.* gratuity, amounting together to 176*l.* 1*s.*; that at the date of the bill of lading Paranque indorsed it to the defendants, in order to pass the property to them, and thereupon the property passed to them, and all conditions, &c., were fulfilled necessary to entitle the plaintiff to claim the freight and gratuity from the defendants, yet they made default in paying the same.

Plea, except as to so much as relates to the carrying and delivery of 217 tons of pit-wood, being parcel of the cargo on the declaration mentioned, that the bill of lading was in the words and figures following [here was set forth the bill of lading in the French language], which said bill of lading is properly translated thus:—"I, Blanchet, master of the ship *Christopher Columbus*, being at L'Orient, in order to go to Cardiff, acknowledge to have received on board my ship, of you, Paranque, 256,782 kilos., the whole safe and in good condition, marked and numbered as in margin [256,782], which I bind myself to convey (perils excepted) to Cardiff, and deliver to the bearer or his order on his paying me 3441 shillings and 4*l.* gratuity, in faith of which, &c. Signed at L'Orient, the 2nd of January, 1873.—A. E. Blanchet"; and

1874

BLANCHET v. POWELL'S LLANTIVIT COLLIERIES COMPANY.

that the plaintiff did not carry or deliver the goods in the bill of lading mentioned, but a portion of the same only, to wit, 217 tons.

Replications. 3. That the plaintiff did carry and deliver to the defendants the whole of the goods delivered to him under the bill of lading, and which were intended to be thereby described; and that the goods so delivered and described as weighing 256,782 kilos., a weight exceeding 217 tons, in fact weighed 217 tons, and no more, and that the weight mentioned in the bill of lading was a mere misdescription, inserted without fraud or default on the plaintiff's part.

4. That the bill of lading was made at L'Orient, in the republic of France, and that, according to the law of France, the whole freight was payable, although part only of the goods was carried and delivered as in the first plea mentioned.

5. Repeating the allegations in the third replication, and adding that the bill of lading was made at L'Orient, in the republic of France, and that, according to the law of France, the whole of the freight was payable.

Demurrers to the plea, and replications, and joinders in demurrer.

R. E. Webster in support of the demurrer to the plea and of the replications. A lump sum is payable for freight, and the remedy, if any, for short delivery is by cross action. The freight is not apportionable: *Robinson* v. *Knights.* (1) The plea, therefore, is bad.

[He was stopped.]

E. Clarke, contrà. It has never been decided that lump freight in a bill of lading is not apportionable; but if it is not, the plea is a good answer to the whole action, for the whole cargo was not carried. If it is, it is an answer as to the part of the cargo not carried: *The Norway* (2); *Ritchie* v. *Atkinson.* (3) As to the replications, the third is bad, for it does not shew that the misdescription was caused by the fraud of the shipper, or the defendants, or some person through whom they claim; and in the absence of

(1) Law Rep. 8 C. P. 465. (2) Br. & Lush. 377.
(3) 10 East, 295.

such fraud the bill of lading is conclusive, under the 18 & 19 Vict. c. 111, s. 3 (1), to shew the actual quantity or weight of the goods shipped. The fourth and fifth replications are also bad. The law of France is not applicable to a contract to be performed in England.

Webster was not called on to reply.

BRAMWELL, B. I think the plaintiff is entitled to our judgment. The plea is ambiguous, but the third replication states in positive terms that the plaintiff delivered to the defendants all the goods he actually received on board. It is said this is no answer, because the plaintiff is estopped, under the Bills of Lading Act (18 & 19 Vict. c. 111), s. 3, from denying that he received any other quantity than that mentioned in the bill. Now, I agree that in some cases, and for some purposes, where the weight of the cargo is material, the master might be bound by the statement of weight in the bill of lading. For example, in an action against him for non-delivery, he might be estopped, but not in such an action as this. The freight here is a lump sum, and, in my opinion, indivisible; and therefore, if there were anything in the point made for the defendants, they would escape paying any freight at all. Again, the owner might maintain this action, and there would clearly be no estoppel against him. The third replication is therefore good.

Further, the fourth replication seems to me to be clearly good. The statute transfers the contract as it existed between the original parties, and this contract was made in France, and the rights and obligations of the parties must be governed by French law. And the fifth replication is even better than the fourth, for it repeats the allegations of the third, and adds that the bill

(1) By the 18 & 19 Vict. c. 111, s. 3, it is enacted that "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless the holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

1874

BLANCHET v. POWELL'S LLANTIVIT COLLIERIES COMPANY.

of lading was made in France, and that by French law the whole freight was payable.

PIGOTT, B. I agree with what has fallen from my Brother Bramwell as to the effect of the Bills of Lading Act, and think that our judgment should be for the plaintiff upon this record.

CLEASBY, B. I am of the same opinion. The plea is ambiguous, but the effect of it is that the quantity stated in the bill of lading to be shipped was not delivered. It is consistent with this that all actually shipped was delivered. That being so, the plaintiff has performed his contract, and is entitled to the lump freight. The only answer to his claim is founded on the 3rd section of the Bills of Lading Act, and it is contended that the statement of weight in the bill of lading estops him. Now, if the bill had acknowledged the receipt of certain specific things—a certain number of horses, for instance—it might be that the plaintiff could not be heard to say that a different number was shipped in fact. But that cannot be said of a mere statement of weight, which may, and often does, vary during the transit; and I do not see any estoppel, therefore, to prevent the plaintiff from saying that the measurement was wrong, it not being suggested that a wrong weight was inserted fraudulently in order to enhance the lump freight recoverable. All the bill of lading means is "Received the cargo fairly weighed." The replications, therefore, seem to me to be good.

Judgment for the plaintiff.

Attorneys for plaintiff: *Ingledew, Ince, & Greening.*
Attorney for defendants: *Gosling.*

DICKESON *v.* HILLIARD AND ANOTHER. 1874

Defamation—Privilege—Communication by one Election Agent to Another—Parliamentary Election—Time for Petition—Interest or Duty. *Jan.* 20.

F. and B. were candidates at a parliamentary election. The defendants were agents of B., and on the day of the election, whilst the poll was proceeding, one of them wrote to the agent of F., stating that bribery on F.'s behalf was going on. B. was returned, and on the next day the plaintiff's name was mentioned by the same defendant to F.'s agent as that of a briber. A discussion upon the imputation ensued, which resulted in the defendants transmitting to F.'s agent on the day following a document signed by both of them, "certifying" that the plaintiff had been personally guilty of bribery.

In an action of defamation brought upon this document:—

Held, that the occasion was not privileged.

Quære, whether it would have been privileged if a petition against the return of B. had been presented or contemplated, the twenty-one days during which such a petition might have been presented not having elapsed.

DECLARATION that, before the time of the committing of the grievances complained of, one T. S. Forbes was a candidate for the representation in Parliament of the borough of Dover, and the defendants, William Edward Hilliard and Evan Hare, falsely and maliciously wrote and published of the plaintiff the words following:—

"Dover election, 1873. We certify that we have discovered that Mr. Dickeson (meaning thereby the plaintiff) and Mr. Robinson (1) have been personally guilty of offering 1*l.* 10*s.* to a voter for his vote, and 1*l.* 10*s.* for every vote he could procure for Mr. Forbes. The elector referred to has been personally examined by one of us, and evidence, which he is prepared to give on oath, is clear and distinct. Dated 24th September, 1873. William Edward Hilliard, chairman; Evan Hare, Mr. Barnett's agent."

Plea: Not guilty. Issue.

The cause was tried before Kelly, C.B., at the London sittings after Michaelmas Term, 1873, when the following facts were proved: In September, 1873, there was a contest for the representation of the borough of Dover between Mr. Forbes on the side of the Liberal party, and Mr. Barnett on that of the Conservative

(1) Mr. Robinson was plaintiff in a similar action to the present, and recovered a verdict for 225*l.*

1874

DICKESON v. HILLIARD.

party. The plaintiff was one of the chairmen of a district committee formed to promote the return of Mr. Forbes. The defendant Hilliard was chairman of Mr. Barnett's committee, and the defendant Hare was his election agent. The polling took place on the 22nd of September, 1873, and resulted in the return of Mr. Barnett. In the course of that day, whilst the poll was being taken, the defendant Hare made a communication to a Mr. Hall, the election agent of Mr. Forbes' committee (between whom and himself an agreement had previously been made that neither party should resort to any corrupt practices), to the effect that two prominent members of Mr. Forbes' committee had been offering money to voters to poll for Mr. Forbes, and that, in consequence, Mr. Barnett would take whatever steps he might be advised. The following day Hall and Hare met, and the plaintiff's name was then mentioned by Hare as that of one of the persons implicated. Mr. Hall stated that if the allegations made as to the plaintiff were properly proved to be true, he would recommend such a course to be adopted as would render a prosecution inexpedient, and the defendant Hare promised to furnish the necessary evidence, and said an apology must be made.

On the 24th of September a certificate, signed by both defendants, and a form of proposed apology was forwarded to Mr. Hall, inclosed in a letter signed by the defendant Hare. The certificate was to the effect above stated in the declaration. The apology proposed contained an undertaking intended for signature by the plaintiff and Mr. Robinson, "in consideration of Mr. Barnett's committee consenting not to prosecute us," to take no part in politics for two years. There was no foundation for the imputation of bribery, and the plaintiff refused to sign the apology forwarded to Mr. Hall, and brought this action.

It was contended, under these circumstances, that the defamatory document was privileged. The learned judge ruled, as a matter of law, that it was not, but further left it to the jury to say whether there was anything to clothe the communication with privilege, and if they thought there was, and that there was no express malice, to give the defendants the benefit of it and find a verdict for them. The jury found a verdict for the plaintiff, damages 225*l.*

Jan. 12, 20. *Giffard, Q.C.*, for the defendant Hilliard, and *E. Clarke*, for the defendant Hare, moved for a new trial, on the ground of misdirection on the part of the learned judge in that he did not tell the jury that the words were written on a privileged occasion and direct them to find a verdict for the defendants. The communication comes within the rule laid down in *Toogood* v. *Spyring* (1) and *Harrison* v. *Bush*. (2) It was made bonâ fide upon a subject in which the parties communicating had an interest to a person having a corresponding interest. The polling was over, it is true, but the twenty-one days during which a petition might have been presented under the Parliamentary Elections Act, 1868 (32 & 33 Vict. c. 125), s. 6, had not elapsed.

[KELLY, C.B. There was no suggestion at the time that a petition was in contemplation. If there had been one either actually filed or proposed to be filed, the case might possibly have been altered.]

It was impossible for the defendants to be sure no petition would be filed, and the communication was one which they were justified in making to the person who would probably decide what course the defeated candidate should adopt. The rule of privilege has been extended of late years (see per Erle, C.J., in *Whiteley* v. *Adams*). (3) It is enough that there was a chance of a petition. A confidential relation had certainly been established between the defendants and Hall prior to the election, and that being so, everything said or written which might be fairly attributed to that relation was protected: *Beatson* v. *Skene*. (4)

[They also referred to *Coxhead* v. *Richards* (5) and *Fryer* v. *Kinnersley*. (6)]

KELLY, C.B. I am of opinion that this rule should be refused. The case has been ably argued by Mr. Giffard and Mr. Clarke, but they have not succeeded in convincing me that the libel complained of was in any sense a privileged communication. I may say, in passing, that although I thought at the trial there was no evidence that the occasion was privileged, I asked the jury whether

(1) 1 C. M. & R. 181.
(2) 5 E. & B. 344.
(3) 15 C. B. (N.S.) 392; 33 L. J. (C.P.) 89.
(4) 5 H. & N. 838; 29 L. J. (Ex.) 430.
(5) 2 C. B. 569.
(6) 15 C. B. (N.S.) 422; 33 L. J. (C.P.) 96.

1874

DICKESON v. HILLIARD.

they thought there was anything in the nature of the relations between the parties that made the communication justifiable; and I told them that if they did think so, and also were of opinion that no express malice was proved, then they should find a verdict for the defendants. They found, however, for the plaintiff, and the question for us is now one of law, whether I ought to have directed them to find for the defendants, upon the ground that the words complained of were protected by the occasion upon which they were published. Now the libel declared upon is this [the learned judge read the words of the declaration]; and if there had been a mere statement that some voter had declared that the plaintiff had offered him a bribe, that might possibly have been protected as being a warning which the defendants were justified in giving to those who represented Mr. Forbes. But the document is much more than this. It is a certificate that the defendants have discovered that the plaintiffs have been guilty of personal bribery; and I can see nothing in the character of Hall, to whom it was addressed, or in the relation between him and the defendants, to clothe it with the immunity afforded by law to statements passing between persons who have a common interest or duty with respect to the subject-matter of such statements. Hall was not a person who had jurisdiction either to punish or to inquire into the alleged bribery by the plaintiff, or who was invested with authority to institute proceedings in respect of it; and the case does not fall within any of the classes to which the doctrine of privilege has hitherto been held applicable.

The first of these classes includes cases like that of *Harrison* v. *Bush*. (1) There the plaintiff, who was a magistrate, was charged with neglect of duty, and the defendant made the communication complained of to the then Home Secretary, with a view to procure the plaintiff's removal from the commission of the peace. The only question was, whether this communication was addressed to the proper person, and it was contended that it should have been addressed to the Lord Chancellor. It was, however, held that the appointment and removal of justices rest with the sovereign, and that although she usually acts through the Lord Chancellor, she might also act through the Secretary of State, and

(1) 5 E. & B. 344; 25 L. J. (Q.B.) 25.

that, therefore, a communication addressed to him as to the alleged misconduct of a magistrate was covered with the same privilege as though it had been addressed to the Queen herself. It was a communication addressed to one in authority, with a view to the institution of judicial proceedings. Clearly it is no authority in the present instance, where the person addressed had no power either to prosecute or institute an inquiry into the conduct of the persons accused.

The second class of cases where privilege has prevailed, is that of military offences, where a court of inquiry into alleged misconduct is either being or about to be held; and a communication made, either to the Court or before the Court is held, with a view of assisting the Court is held privileged, because the proceedings, if not strictly judicial, are in the nature of judicial proceedings, and it is the duty of every one concerned to give information which may assist in the proper prosecution of the inquiry. Such were the cases of *Dawkins* v. *Lord Rokeby* (1) and *Beatson* v. *Skene*. (2) The policy of the law covers, and rightly covers, such information with privilege.

The third class of privileged communications is of a different nature and consists of cases where the defendant makes a defamatory statement to some one who applies to him for information and to whom he has a moral or social, if not a legal, duty. The most familiar instance is that of giving a character to a servant, where a libel, if bonâ fide published and without express malice, is shielded. Other cases might be put; for example, a statement made by one member of a vestry or club defamatory of another, to persons who had an interest in hearing it. But I know of no case which covers the present, where, after the election was over, the defendants take upon themselves to certify that the plaintiff has committed an act of bribery, and make their certificate to one who has no authority or duty either to punish or to inquire into the truth of the allegations made, and who did not invite the statement. There should therefore be no rule.

PIGOTT, B. I am of the same opinion. I do not think that my Lord misdirected the jury in this case. He decided, and in my

(1) Law Rep. 8 Q. B. 255. (2) 5 H. & N. 838; 29 L. J. (Ex.) 430.

1874

DICKESON v. HILLIARD.

judgment rightly decided, that the occasion upon which the defamatory statement complained of was published was not privileged; and he moreover left it to the jury to say whether the relation between Hall and the defendants could render the communication justifiable. The question is really one for the judge, and it is now before us as one of law. Now the legal canon as to privilege is well enunciated in *Harrison* v. *Bush* (1) in these words: "A communication made bonâ fide on any subject-matter in which the party communicating has an interest or in reference to which he has a duty is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which without this privilege would be actionable"; and in the same case the word "duty" is explained as including what may be called a duty of imperfect obligation, a moral or a social duty. It seems to me that the facts proved at the trial do not shew that any duty whatever was cast upon the defendants to publish the certificate complained of. There was an election proceeding at Dover, at which Messrs. Forbes and Barnett were the candidates. Mr. Hall was the election agent for Forbes, and the plaintiff was a member of one of the ward committees. The defendants held corresponding offices on Barnett's side. On the 22nd of September the polling took place, and on that day a communication was made by Hare to Hall, that bribery was going on upon Forbes' side. If this had been the libel which is the subject-matter of this action a serious question of privilege might have arisen. But it is not so. No doubt the statement made on the 22nd was to some extent the foundation of the subsequent libel. Hall directed some inquiry to be made, but no result immediately followed. The next day Hall, without any communication with the plaintiff, wrote to Hare, asking for an interview, which accordingly took place. Hall then requested Hare not to prosecute the parties supposed to be guilty, and went on to say that if prosecution was forborne, and if he was properly certified that bribery had been committed by the plaintiff, whose name was first mentioned at this interview, he would take measures which would render it unnecessary or inexpedient to prosecute. Upon that the defendant Hare wrote out, and both he and Hilliard signed, the certificate

(1) 5 E. & B. at p. 348.

declared upon, and sent it the next day (the 24th of September) to Hall. It contains grossly defamatory matter; and I cannot see any interest or duty which rendered it privileged. The defendants were committeemen of one candidate, and Hall was agent of the other, and if the election had been proceeding, possibly an interest or duty might have been held to exist. But on the 24th the election was at an end. Hall had no authority to prosecute the plaintiff, nor any legal control over him. His interest or duty, if he ever had one, had ceased.

It was contended that it was possible a petition might have been presented. But this is a mere hypothesis, and cannot clothe the certificate with immunity. Hall was in fact a volunteer, stepping forward without any authority from the plaintiff, to defend him, or to shield him from the consequences of the offence which it was asserted he had committed. For these reasons I agree with my Lord, that there was no privilege, and the rule must therefore be refused.

POLLOCK, B. I am also of opinion that there should be no rule. The rule as to privilege has in modern times been somewhat enlarged, and I do not wish to narrow it. It is, however, equally important to see that persons are not allowed by their own acts to constitute an occasion privileged which would otherwise not be privileged, having regard to the relations which naturally exist between them. It is said that this certificate was published by the defendants to Hall in pursuance of an interest or duty. But Hall had no authority to prosecute the offenders; and I cannot see anything in the circumstances to warrant me in holding that the defendants and Hall had any common interest or duty whatever. No inquiry was made of the defendants in response to which the defamatory statement was made. The defendants volunteered it, and to hold that just because Hall was the election agent of another candidate at an election, which was over, the occasion was privileged, would be going far beyond what any cases have hitherto justified.

Rule refused.

Attorneys for plaintiff: *Bower & Cotton.*
Attorneys for defendants: *Dryden; Hare.*

1874
Feb. 12.

HIORT *v.* BOTT.

Conversion—Goods sent by Mistake—Intention to Appropriate the Goods.

The plaintiffs sent to the defendant an invoice for barley, which stated that the barley was bought by the defendant of the plaintiffs through G. as broker, and also a delivery order, which made the barley deliverable to the order of the consignor or consignee. The defendant had not in fact ordered any barley of the plaintiffs. G. called on the defendant, who showed him the documents, and told him it was a mistake. G. said that it was so, and asked the defendant to indorse the order to him, for the purpose, as he said of saving the expense of obtaining a fresh delivery order. The defendant indorsed the order to G., who possessed himself of the barley and disposed of it, and then absconded.

On the trial of an action of trover for the barley, the jury found that the defendant had no intention of appropriating the barley to his own use, but indorsed the order for the purpose of correcting what he believed to be an error, and returning the barley to the plaintiffs:—

Held, that the defendant, having indorsed the order without any occasion to do so, and without authority, was liable.

Action of trover for barley, tried before Archibald, J., at the Staffordshire Summer Assizes, 1873.

The facts were as follows:—The plaintiffs, who were corn merchants, trading under the name of Brochner and Co., at Hull, had been in the habit of employing one Grimmett as their broker. In consequence of a telegram from Grimmett, they, on the 8th of June, 1872, forwarded to the London and North Western Railway station at Birmingham 83 quarters of barley, and at the same time sent to the defendant, who was a licensed victualler carrying on business at Deritend, Birmingham, a letter, inclosing an invoice for the barley, in which it was stated to be "sold by Mr. Grimmett as broker between buyer and seller," and a delivery order, which made the barley deliverable "to the order of consignor or consignee." The barley had in fact never been ordered by the defendant, who had had no previous dealings with either the plaintiffs or Grimmett. A day or two after the receipt of these documents by the defendant, Grimmett called; the defendant produced the documents, and said, "What does this mean? I never bought any barley through you off Brochner and Co." Grimmett said "it was a mistake of Brochner and Co.; they had no doubt confused the defendant's name and some other name; they were

doing a large business, and might have made a mistake." Grimmett then asked the defendant to indorse the order, telling him that he could not get the barley without, and that by not sending the order back expense would be saved. Thereupon the defendant indorsed the delivery order to Grimmett, who took it to the railway station, obtained delivery of the barley, disposed of it, and absconded.

In answer to a question by the learned judge, the jury found that the defendant, in signing the order, had no intention of appropriating the barley to his own use, but was anxious to correct what he believed to be an error; and, on the learned judge adding, "and with a view of returning the barley to the plaintiffs," they assented.

The learned judge then directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them for 180*l.*, the value of the barley. A rule having been obtained accordingly,

Feb. 10. *Jelf* (*Powell, Q.C.*, with him) shewed cause. The cases in which trover will lie are enumerated by Alderson, B., in *Fouldes* v. *Willoughby* (1) as follows: "The true principle is that stated by Chambre and Holroyd, JJ., when at the bar, in their argument in the case of *Shipwick* v. *Blanchard* (2), that 'in order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or to the use of those for whom he is acting.' This definition, indeed, requires an addition to be made to it, namely, that the destruction of the goods will also amount to a conversion." That statement is adopted in 2 Notes to Saunders, p. 108, in these words: "The taking or detention of the chattel must be with intent to convert it to the taker's own use, or that of some third person; or the act done must have the effect of destroying or changing the quality of the thing." Another test is suggested by the judgment of Cleasby, B., in *Fowler* v. *Hollins* (3), that the act must be one "dealing with the property." Tried by any of these rules, there was here no conversion; for the defendant intended nothing but

(1) 8 M. & W. 540, at p. 549. (2) 6 T. R. 299.
(3) Law Rep. 7 Q. B. at p. 639.

1874

HIORT v. BOTT.

to return the barley to the plaintiffs, and had no thought of dealing with the property. Tried by the test of reason, the result would be the same. For if a man has goods sent to him which he has never ordered, whether by mistake, or on approval, or by way of advertisement, he becomes an involuntary bailee, and is called upon by the act of the sender to do something with them, unless he means to keep the goods as his own. Then what is he to do? It is certainly not unreasonable that he should take steps to return them to the sender; and unless in what he does he is guilty of gross carelessness, he ought not to be held liable for their miscarriage. That is what the defendant has done here; he took steps to return the goods to the owners through the owners' agent; and he ought not to be made liable for that agent's fraud. His position is the same as, or better than, that of the defendants in *Heugh* v. *London and North Western Ry. Co.* (1), and *M'Kean* v. *M'Ivor.* (2)

Bosanquet (*Huddleston, Q.C.*, with him) in support of the rule. It is enough to constitute a conversion if the defendant, by means of an unauthorized act, has deprived the plaintiffs of the possession of their goods, either permanently or for an indefinite time. This is the effect of the decision in *Fowler* v. *Hollins* (3), and agrees with what is said by Alderson, B. in *Fouldes* v. *Willoughby* (4), and cited and approved by Martin, B. in delivering the judgment of the Court in *Burroughes* v. *Bayne.* (5) "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another it is a conversion." Here the defendant has certainly done an unauthorized act, and one which was without excuse. There was no occasion for him to deal with the barley at all; for it was not in his possession, and no act of his was required to give the plaintiffs possession of it. His case is therefore wholly unlike that of an involuntary bailee, who has, against his will, the actual custody of the goods. That he did

(1) Law Rep. 5 Ex. 51.
(2) Law Rep. 6 Ex. 36.
(3) Law Rep. 7 Q. B. 616.
(4) 8 M. & W. 540.
(5) 5 H. & N. 296, at p. 303; 29 L. J. (Ex.) 185.

not mean to appropriate the barley to his own use is immaterial, if his act deprived the plaintiffs of their property.

Cur. adv. vult.

Feb. 12. The following judgments were delivered:—

BRAMWELL, B. This case was argued before my Brothers Pigott and Cleasby and myself, and we are all of opinion that the rule must be made absolute. [After stating the facts the learned judge proceeded:—]

I think the plaintiffs are entitled to recover; though, so far as concerns the defendant, whose act was well meant, I regret the result. Mr. Bosanquet gave a good description of what constitutes a conversion when he said that it is where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time. The expression used in the declaration is "converted to his own use;" but that does not mean that the defendant consumed the goods himself; for, if a man gave a quantity of another person's wine to a friend to drink, and the friend drank it, that would no doubt be as much a conversion of the wine as if he drank it himself. Now here the defendant did an act that was unauthorized. There was no occasion for him to do it; for the delivery order made the barley deliverable to the order of the consignor or consignee, and if the defendant had done nothing at all it would have been delivered to the plaintiffs. And there is no doubt that by what he did he deprived the plaintiffs of their property; because, by means of this order so indorsed, Grimmett got the barley and made away with it, leaving the plaintiffs without any remedy against the railway company, who had acted according to the instructions of the plaintiffs in delivering the barley to the order of the consignee. The case, therefore, stands thus: that by an unauthorized act on the part of the defendant, the plaintiffs have lost their barley, without any remedy except against Grimmett, and that is worthless. It seems to me therefore, that this was assuming a control over the disposition of these goods, and a causing them to be delivered to a person who, deprived the plaintiffs of them. The conversion is therefore made out.

Various ingenious cases were put as to what would happen if, for

1874

HIORT v. BOTT.

instance, a parcel were left at your house by mistake, and you gave it to your servant to take back to the person who left it there, and the servant misappropriated it. Probably the safest way of dealing with that case is to wait until it arises; but I may observe that there is this difference between such a case and the present one, that where a man delivers a parcel to you by mistake, it is contemplated that if there is a mistake, you will do something with it. What are you to do with it? Warehouse it? No. Are you to turn it into the street. That would be an unreasonable thing to do. Does he not impliedly authorize you to take reasonable steps with regard to it—that is, to send it back by a trustworthy person? And when you say, "Go and deliver it to the person who sent it," are you in any manner converting it to your own use? That may be a question. But here the defendant did not send the order back; but at Grimmett's request indorsed it to him, though, no doubt, as the jury have found, with a view to the barley being returned to the plaintiffs. There is therefore a distinction between the case put and the present one. And there is also a distinction between the case of *Heugh* v. *London and North Western Ry. Co.* (1), which was cited for the defendant, and the present case; because there it was taken that the plaintiff authorized the defendants to deliver the goods to a person applying for them, if they had reasonable grounds for believing him to be the right person.

On these considerations I think the plaintiffs are entitled to recover. But I must add one word. This is an action for conversion, and I lament that such a word should appear in our proceedings, which does not represent the real facts, and which always gives rise to a discussion as to what is, and what is not, a conversion. But supposing the case were stated according to a non-artificial system of pleading, thus: "We, the plaintiffs, had at the London and North Western Railway station certain barley. We had sent the delivery order to you, the defendant. You might have got it, if you were minded to be the buyer of it; you were not so minded, and therefore should have done nothing with it. Nevertheless, you ordered the London and North Western Railway Company to deliver it, without any authority, to Grimmett, who took it away." Would not that have been a logical and precise statement of a tortious act

(1) Law Rep. 5 Ex. 51.

on the part of the defendant, causing loss to the plaintiffs? It seems to me that it would. I think, but not without some regret, that this rule should be made absolute, to enter the verdict for the plaintiffs.

CLEASBY, B. I am of the same opinion, and shall only add a few words for the purpose of making the ground of decision clearly understood, and of shewing that we are not questioning or overruling any of the authorities referred to.

It should be particularly noticed in this case that the plaintiffs had not, by what they had done, placed the defendant in any position of difficulty, as is often the case with an involuntary bailee (an expression often used in the argument) who has received property into his possession for a purpose which cannot, as it afterwards appears, be exactly carried into effect, and who does his best and acts in a reasonable manner for carrying into effect the purpose of the bailment. In such cases the bailee has a duty to perform in relation to the goods, and he is placed in a difficulty in the discharge of that duty by the default of the plaintiff, who ought not to be allowed to complain if, under that difficulty, the bailee has acted in a manner which is considered reasonable and proper.

But no difficulty of that sort arises here, because the goods were consigned to the order of the consignee or consignor; and the defendant, being the consignee and in possession of the order, must have known that there was some mistake in making him consignee, and so the goods were properly deliverable to the order of the consignor. He had no duty to perform in relation to the goods, and was a mere stranger, except that by mistake he had been made consignee, and so had an ostensible title, and could dispose of the goods. This distinguishes the present case from the cases against railway companies referred to in the argument.

It is also to be observed that the present case is different from a class of cases referred to in the argument, in which some act is done to goods, such as shoeing a horse, packing goods, or forwarding them on. In these cases no act is done having reference to the property in the goods or the right to the possession of them. The act is consistent with the title of any person. But in the

1874

HIORT v. BOTT.

present case the act of the defendant transfers the title to the possession of the goods, so as to cause them to be lost to the real owner.

The jury have found that the defendant did not intend to appropriate them to himself by the transfer, but intended them to be returned to the plaintiffs. According to the evidence, the object of the transfer was not to have the goods actually returned to the owner, but to dispense with the necessity of sending to the plaintiffs for a fresh order making the goods deliverable to the real purchaser; and, although it does not make any real difference, this must have been what the jury meant, because by the form of the note the goods were at the disposal of the plaintiffs if the defendant did nothing.

The ground of the decision in the present case is that the defendant had no title whatever to the goods—that there was no necessity whatever for his interfering in any manner in the disposal of them, but that he improperly, though innocently—being prevailed upon to do so by Grimmett—having the indicia of title, by mistake, as he knew, transferred that title to the possession of Grimmett. I think a person who deals with the property in this way does so at his peril, and if by means of it a fraud upon the owner is accomplished, he is responsible.

It was not left to the jury in this case to say whether the conduct of the defendant was reasonable and proper, but I do not think that this was necessary. No objection was made on the argument that this had not been done; but it was unnecessary, because to transfer voluntarily the title to the possession of goods, in which you have no interest whatever, to a third person is, in my opinion, under the circumstances of the present case, obviously improper and unreasonable; and that is the ground of my judgment.

Rule absolute.

Attorneys for plaintiffs: *Chester, Urquhart, & Co., for Arnold & Son, Birmingham.*

Attorney for defendant: *Rogers, for Powell, Birmingham.*

VAUGHTON *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

1874
Jan. 28.

Carriers Act (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68), *s.* 8—*Felony of Carrier's Servants—Evidence.*

In an action against carriers for loss of the plaintiff's goods, upon an issue that the loss arose from the felonious acts of the defendants' servants, it is sufficient to prove facts which render it more probable that the felony was committed by some one or other of the defendants' servants than by any one not in their employment; and it is unnecessary to give such evidence as would suffice to convict any particular servant.

DECLARATION, 1st count, for delay in delivering certain goods of the plaintiff, by him delivered to the defendants as carriers, to be carried from Birmingham to Liverpool; 2nd count, for the loss of the goods.

Plea, alleging that the breaches of duty in the declaration alleged were by reason of the loss of the goods, and shewing that the defendants were entitled to the protection of the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68).

Replication: that the loss arose from the felonious acts of servants in the employ of the defendants. Issue.

At the trial before Honyman, J., at the Warwick Summer Assizes, 1873, it was proved that the goods lost consisted of a parcel of jewelry worth more than 10*l.*, delivered on the 29th of January, 1873, by the plaintiff, a Birmingham jeweller, to the defendants, to be carried by them to Liverpool and there delivered, at Lawrence's Hotel, to one Holland, his Liverpool traveller. It was admitted that the goods were duly delivered to the defendants at Birmingham, and that no declaration of value was made. The delivery at Lawrence's Hotel should, in the ordinary course, have been made by a person named Thurston, who is the defendants' Liverpool agent for the delivery of goods. On the 30th of January Thurston's van, under the charge of a carman, arrived with some parcels at Lawrence's Hotel. According to the entry in the carman's book, the plaintiff's parcel should have been among these. The carman brought two parcels into the hotel, and then presented his book for signature to the housekeeper, who was about to sign,

1874

VAUGHTON v. LONDON AND NORTH WESTERN RAILWAY CO.

when the proprietor of the house, observing that only two parcels had been brought in, whereas the book mentioned three, called the carman's attention to the fact. He did not seem aware that the number of parcels delivered and to be signed for did not correspond, and returned to the van to search for the missing parcel, and afterwards sent his boy to the defendants' station in Lime Street, Liverpool, to inquire for it. The search proved fruitless. A few days afterwards some of the missing articles were seen in a pawnbroker's shop, and inquiries were instituted which resulted in the arrest of two men not in the employment of the defendants. These men were afterwards discharged, there being no evidence against them; but whilst in custody they made a statement which induced the police, on the 10th of February, to search a fish siding close to the Lime Street Station, and only about 100 yards from the place where the parcel vans were usually loaded. Both the siding and the place of loading were on the defendants' premises, and to both it was possible for the public to have access. The police found upon the siding some pieces of wood which were identified as a part of the box in which the plaintiff's jewelry had been placed, and also a horse-shoe pin which had been in the parcel. It further appeared that a servant of the defendants, had, four days previously, found another pin on the siding, but, not thinking it was of any value, had said nothing about his discovery. The learned judge left to the jury to say whether, under the circumstances, they were of opinion that the goods had been lost through the felony of the defendants' servants. The jury found for the plaintiff, damages 47*l.* A verdict was entered accordingly, with leave to move to enter a verdict for the defendants, on the ground that there was no evidence of felony on the part of the defendants' servants. (1) A rule was obtained in Michaelmas Term, 1873, in pursuance of the leave reserved.

Digby Seymour, *Q.C.*, and *Forbes*, shewed cause. There was

(1) The 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, enacts that carriers are not to be liable for the loss, inter alia, of jewelry above the value of 10*l.*, unless the value is declared; and by s. 8 it is provided that nothing in the Act shall protect any common carrier from liability for loss or injury to goods "arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant" in the carrier's employ.

ample evidence for the jury in support of the replication, although possibly no such evidence as would have warranted the conviction of any particular servant of the company. It is not necessary to offer evidence which would insure a conviction of any servant in particular, or even the finding of a true bill against him: *Boyce* v. *Chapman* (1); it is enough to shew facts which, unless explained, would warrant the inference that some one or more persons in the defendants' employ were guilty. Thurston and his servants are the servants of the defendants within the meaning of s. 7 of the Carriers Act: *Machu* v. *South Western Ry. Co.* (2)

Field, Q.C., and *Carter*, in support of the rule. The evidence here is equally consistent with the felony having been committed, either by some or one of the defendants' servants or by other persons; but, in order to support the replication, the evidence must be more consistent with the guilt of the defendants' servants than with the guilt of any one else. In *Great Western Ry. Co.* v. *Rimell* (3) it is said, by Willes, J., in reference to the evidence necessary to support a similar replication, that there must be "some one substantial, credible fact" inconsistent with the theory that some other person was the thief; and again, in *Metcalfe* v. *London, Brighton, and South Coast Ry. Co.* (4), the same learned judge says that "to make out a primâ facie case, the plaintiffs ought to shew, not only that the theory of a felony having been committed by one of the company's servants is consistent and probable, but that there is some one fact which is wholly inconsistent with a contrary theory." Now, here no fact was proved which was "wholly inconsistent" with the goods having been stolen by somebody not in the defendants' employment. Certainly there was no evidence to fix guilt upon any particular servant of the company; but if the replication is held to have been proved, it will cast suspicion upon all the servants of the company who were in any way concerned with dealing with the goods. It may be said that the defendants should have called their servants as witnesses; but if the defendants' contention is correct, there was no case for them to answer.

KELLY, C.B. I am by no means prepared to say that the evi-

(1) 2 Bing. (N.C.) 222.
(2) 2 Ex. 415.
(3) 18 C. B. 575; 27 L. J. (C.P.) 201.
(4) 4 C. B. (N.S.) 307; 27 L. J. (C.P.) 333.

1874

VAUGHTON v. LONDON AND NORTH WESTERN RAILWAY CO.

dence in this case is such as would have sustained a criminal prosecution against any servant of the company, or indeed that there was a case which a judge would have been justified in leaving to the jury against any of them. But we ought to deal with this case upon a different principle, and not insist upon evidence which would convict any particular individual. Suppose, for example, that a railway company have possession of a parcel to be forwarded on the day following its being received. Suppose that in the interval it is locked up in a cupboard to which two of their servants, and only two, have a key, and that it is stolen in the night, under circumstances which irresistibly lead to the inference that one or other of these two persons must be the thief. It might well be that it would be impossible to bring home the crime to either, and that if either was put upon his trial, he would be entitled to an acquittal. But in such a case, could it be doubted that a replication of felony to a plea of the Carriers Act would be proved? The language of the Act itself, it must be remembered, is general. The felony of "any coachman, &c., or other servant," is enough to charge the defendants with liability.

There is, moreover, in my opinion, another ground why a broad distinction may properly be drawn between the sort of evidence which is required to prove the replication of felony and to prove an indictment. I refer to the fact that in the civil proceeding the parties implicated are competent witnesses, and can be called to rebut any primâ facie case which may be made out against them. The absence from the witness box of the persons who might have explained anything which may have appeared suspicious is in itself a matter which the jury are entitled to consider, and the defendants' failure to adduce evidence which might have cleared up all doubts was in *Boyce* v. *Chapman* (1) (a case very similar to the present), considered by Tindal, C.J., to be sufficient reason for not interfering with the verdict of the jury. Mr. Carter, in his able argument, dwelt emphatically on the hardship on all the servants of the defendants who were in any way connected with the carrying of the plaintiffs' goods of allowing a verdict to stand which fixes an imputation upon all of them. The answer to that observation is that the defendants might have called their suspected servants

(1) 2 Bing. (N.C.) 222.

as witnesses. They did not think it proper to do so, and therefore cannot now complain.

Now as to the evidence itself, I certainly think there was no case against the carman, which could have been left to the jury on the Crown side. His act in requesting or permitting the servant at the hotel to sign for three parcels when he had only delivered two, is a circumstance requiring the explanation which very probably he would have readily given if he had been allowed to appear as a witness; but it is certainly not enough even to leave to a jury on a criminal charge.

With regard to the servant who found the pin the case is somewhat stronger, for he unquestionably was in possession of some of the stolen property shortly after it had been stolen. That would have been some evidence for a jury that he was concerned in the larceny. I do not for a moment say that the fact could not have been explained, but here again the defendants did not allow an explanation to be given. The rule, therefore, must be discharged. As in *Boyce* v. *Chapman* (1), the evidence was slight, but it required, and did not receive, an answer.

PIGOTT, B. I am of the same opinion. The question is whether there was evidence to support this replication, and it has been contended that the evidence required must be such as would suffice to convict some particular servant of the defendants. But I cannot assent to that argument. I read the judgment of Willes, J., in *Metcalfe* v. *London, Brighton, and South Coast Ry. Co.* (2), as amounting to this, that evidence must be given shewing it to be more likely that the servants of the company stole the goods than that any one else did. That is very different from saying that the evidence must be such as would convict this or that particular servant. In the present case I think the evidence given was more consistent with the guilt of the defendants' servants than with that of any person not in their employment, for the defendants' servants had greater opportunities than others. That being so, there was a case for the jury, the onus of answering which was upon the defendants. They might have answered it by calling

(1) 2 Bing. (N.C.) 222.
(2) 4 C. B. (N.S.) 307; 27 L. J. (C.P.) 333, at p. 334.

1874

VAUGHTON v. LONDON AND NORTH WESTERN RAILWAY CO.

the servants towards whom suspicion was directed, but they determined not to call witnesses. They preferred to leave the matter unexplained. It is impossible, under these circumstances, to say that there was no evidence for the jury.

AMPHLETT, B. I am also of opinion that there was evidence in support of this replication. It has been forcibly contended that the evidence should be such as to bring home the felony to some particular servant of the company; and if that were so, I should pause before deciding, at all events, as to one of the servants in question—the carman—that there was any evidence which ought to be left to a jury if he were upon his trial; whilst as to the other, although I am far from saying that his conduct is not susceptible of easy explanation, still, if it were necessary to decide the point, I should say that there was a case against him which required an answer. But it is not needful to go so far. For I agree with my Lord and my Brother Pigott that it is sufficient to shew that some servant of the company was guilty, and not necessary to bring the offence home to any servant in particular. As to the remarks which have been made to us upon the effect of the verdict upon the characters of all the defendants' servants who had anything to do with this box of jewelry, it must be remembered that they were all competent witnesses, and might have been called to explain what, in the case of one of them at least, required an explanation; and the fact that they were not called was itself a circumstance which we are entitled to consider when deciding whether or not there was a question for the jury.

Rule discharged.

Attorneys for plaintiff: *Barton, Yeates, & Hart.*
Attorneys for defendants: *R. F. Roberts.*

SPOOR *v.* GREEN.

1874
Jan. 31.

Covenanting for Title and for Quiet Enjoyment—Continuing Breach—Statute of Limitations (3 & 4 *Wm.* 4, *c.* 42) *s.* 3—*Minerals—Support.*

In 1844 the defendant was party to a twenty-one years lease of coal mines, which gave certain powers over the surface incidental to the working of those mines and an adjoining colliery. The coals so demised were substantially worked out before September, 1845. In October, 1845, the defendant sold and conveyed the land to J., who knew of the workings, and the defendant covenanted with him for title, for quiet enjoyment, and against incumbrances. In July, 1846, J. sold and conveyed to the plaintiff, who was ignorant of the workings. In 1865, in consequence of the mining operations above described, the land subsided, and houses built on it by J. and the plaintiff were damaged.

In 1848, subsequently to the plaintiff becoming owner of the land, and within twenty years before action, the lessees, or persons acting under their authority, entered the mines and took some fire-clay (which was not included in the demise) and a few loose pieces of coal.

In an action brought on the above covenants, the declaration in which alleged that *whilst the plaintiff was seised* the lessees entered upon the land, and worked, got, and carried away the coal, whereby the plaintiff lost the coal, and the land subsided :—

Held (by the Court), that as to the breach of the covenant for quiet enjoyment by the removal of coal which caused the subsidence, there was a fatal variance between the declaration and the evidence, which under the circumstances the Court declined to amend.

By Bramwell and Cleasby, BB. First, that the fact of the coals having been worked out was no breach of the covenant for title, J. never having bought those coals; that the subsistence of the lease in respect of the coal left unwrought and the powers (not exercised) incident to the working of other collieries, did not constitute a breach; that the breach (if any) was complete in the time of J., and (by Bramwell, B.) that the action was barred by the Statute of Limitations.

Secondly, that neither the acts of trespass in taking the fire-clay, in 1848, nor the subsidence caused in 1865 by the workings in 1845, were breaches of the covenant for quiet enjoyment, on the ground that the first was a mere trespass, and that as to the second, the subsidence gave no new cause of action; the principle of *Bonomi* v. *Backhouse* (9 H. L. C. 503) not applying to a case where the subsidence is caused by a wrongful taking of the plaintiff's minerals.

By Kelly, C.B. First, that the subsistence of the lease was a continuing breach of the covenant for title, in respect of which the plaintiff was entitled to nominal damages.

Secondly, that the removal of the small pieces of coal, in 1848, was a breach of the covenant for quiet enjoyment, in respect of which the plaintiff was also entitled to nominal damages.

Thirdly, that, the removal of the coal by the lessees being lawful, the subsidence in 1865 gave a new cause of action to the plaintiff.

SPECIAL CASE stated with pleadings.

The case stated as follows :—

This action was commenced on the 6th of July, 1867.

1874

SPOOR v. GREEN.

On the 28th of June, 1842, T. C. Granger conveyed to the defendant twenty-eight acres of land at Low Bitchburn, Durham, without any exception of mines or minerals. The consideration was expressed to be the sum of 740*l.*, but it was at the same time arranged that the defendant should hold the land for the sole benefit of T. C. Granger, which he continued to do, acting for and under the direction of Granger.

On the 15th of December, 1842, the defendant mortgaged the land to Boyd and others.

By a memorandum of agreement dated the 23rd of July, 1844 (1), T. C. Granger agreed to let to J. Smith and J. Sharp, who agreed to take and accept a lease of, "all the veins or seams of coal within and under the lands and grounds of the said T. C. Granger situate at Low Bitchburn," described as consisting of twenty-eight acres, with power for the lessees, their executors, administrators and assigns "to enter upon the said lands and grounds, and to dig for, sink, win, and work the several seams of coal lying and being within and under the same, and to draw the coals so gotten thereupon, or which should or might be gotten by the lessees forth and out of the adjoining lands called Thistle Flatt, to bank on the said lands and grounds of the said T. C. Granger, and to lead and convey the said coals so to be gotten, as well in, from, and out of the said lands and grounds last mentioned, as in, from, and out of the said adjoining lands called Thistle Flatt, over and along the said lands and grounds of the said T. C. Granger; and with all other powers and privileges fit and necessary for the convenient winning and working, getting, and conveying away all the said coals so to be gotten, as aforesaid, upon and subject to the terms and conditions thereinafter mentioned;" by which conditions the term was to be twenty-one years from the 1st of July, 1844, but which, having regard to the findings in the case, it is not material to state further.

This agreement was signed by the defendant as follows: "For T. C. Granger, William Green."

On the 4th of April, 1845, the defendant and the mortgagees, under the mortgage of the 15th of June, 1842, which was then paid off, mortgaged the land in fee to Mr. Pearson.

On the 27th of October, 1845, the defendant and Pearson conveyed a small portion of the land to one Jamieson, his heirs and

(1) Before 7 & 8 Vict. c. 76, s. 4.

assigns, to such uses as he should appoint, and subject thereto to the use of a dower trustee in trust for Jamieson during his life, with remainder to the use of Jamieson, his heirs and assigns; and by this deed the defendant for himself, his heirs and assigns, covenanted with Jamieson, his appointees, heirs, and assigns, that notwithstanding any act, deed, matter, or thing done or permitted by the defendant or by Pearson to the contrary, the defendant and Pearson had, or one of them had, good right to grant, release, and convey the said hereditaments thereby conveyed, with the appurtenances, unto and to the use of, or in trust for, Jamieson, his heirs and assigns, in manner aforesaid; and that it should be lawful for Jamieson to enter upon and enjoy the said hereditaments with the appurtenances, and to receive and take the rents and profits thereof for his and their own use and benefit, without any interruption whatsoever from or by the defendant or Pearson, their or either of their heirs, executors, administrators, or assigns, or any person claiming through or in trust for them; and that, free and clear, or otherwise by the defendant, his heirs, executors, or administrators, well and sufficiently indemnified from and against all estates, titles, liens, charges, and incumbrances whatsoever.

Jamieson entered into possession and built a dwelling-house on part of the land conveyed to him.

On the 30th of July, 1846, Jamieson sold part of the land to the plaintiff, and appointed it to the use of the plaintiff, his heirs and assigns; and on the 21st of August, 1846, he sold to the plaintiff the remaining part with the dwelling-house, appointing it to the use of the plaintiff, his heirs and assigns. The plaintiff afterwards built other houses on the land so conveyed to him.

Shortly after the agreement of the 23rd of July, 1845, Smith and Sharp commenced to work the coal included in the agreement, and sank a shaft in the twenty-eight acres about sixty yards east of the land afterwards conveyed to Jamieson.

On the 24th of December, 1865, the surface of plaintiff's land subsided, in consequence of the mining operations of Smith and Sharp, and his houses were greatly damaged. The plaintiff required the defendant to indemnify him, but the defendant refused.

The subsidence was caused by mining operations carried on under

1874

SPOOR v. GREEN.

the land conveyed to the plaintiff, before the conveyance to him of any part of the land, and which consisted of workings in the coal leaving walls and pillars. Between the 1st of August, 1846, and the 6th of July, 1847, and between the 6th of July, 1847, and the 1st of August, 1848, Smith and Sharp, or persons acting under their authority, dug out and took away some of the fire-clay which formed the floor of the workings, and at the same time took and carried away some pieces of coal which had from natural causes fallen from the sides of the walls and pillars of coal left in the working upon the floors of the workings, and pieces of coal forming the sides of the walls and pillars which had from natural causes become broken and partially detached from them.

None of these last-mentioned operations, however, in any way contributed to the subsidence.

Except as above stated, the defendant had not authorized any of the operations carried on under the plaintiff's land, nor had any notice of them.

By a supplementary certificate (1) of the arbitrator who stated the case, it appeared that the mining operations which caused the subsidence ceased in September, 1845; that Jamieson, before the sale to him, had notice and knowledge of them, and was shewn and went into the workings where they had been carried on under the land conveyed to him, and knew that they had been carried on by Smith and Sharp; but did not know anything as to the right of Smith and Sharp to carry them on, or of their title to the coal removed by them, or of the lease to them; and that the plaintiff heard of these mining operations and of the lease to Smith and Sharp for the first time after the subsidence.

It further appeared that the price given by Jamieson for the land sold to him, which was one-seventh of an acre, was 12*l.*, which would have been an inadequate price if the coal under the land had been unworked and had been included in the purchase.

Also that a portion of the walls and pillars of coal still remained under the plaintiff's land.

It also appeared that by the mortgage of the 4th of April, 1845, the defendant covenanted with Pearson, his executors, ad-

(1) Made after the argument. See post, p. 106.

ministrators, and assigns, for quiet enjoyment, freedom from incumbrances, and further assurance.

The pleadings were as follows:—

Declaration stating the covenant contained in the deed of October 27, 1845 (set out ante, pp. 100, 101), and alleging as breaches, first, that neither the defendant nor Pearson had, notwithstanding any act, deed, matter, or thing done or permitted by the defendant or Pearson to the contrary, good right to grant release or convey the said hereditaments in manner aforesaid conveyed with the appurtenances; but, on the contrary, John Joseph Smith and John Sharp, who, at the date of the deed of the 27th of October, 1845, and thence continually until the doing of what is hereinafter mentioned, by reason of acts, matters, and things done and permitted by the defendant, had lawful right and title to do what is hereinafter alleged to have been done by them, and having such lawful right and title as aforesaid, afterwards, and *whilst the plaintiff remained and continued seised* of the said two pieces of ground so conveyed to him as aforesaid, entered upon the same, and the seams of coal within and under the same, and worked and got and carried away the said coal, whereby the plaintiff lost the said coal so worked, won and gotten, and the surface of the said two pieces of ground subsided with the houses then built thereon, and the land and houses were damaged, &c.

Second breach: That the plaintiff had not enjoyed the said hereditaments without interruption from the defendant or persons claiming through him, alleging a demise by the defendant, before the execution of the deed of October 27, 1845, to Smith and Sharp of all the veins and seams of coal within and under the said two pieces of ground, with power to enter and dig, &c., for an "interest and tenancy" which at the time of the execution of the said deed and of the doing by them of the acts thereinafter mentioned had not expired, alleging an entry upon the said seams of coal, and a working, getting, and carrying away of the coal, *whilst the plaintiff was seised*, whereby the plaintiff lost the coal, and the land subsided, &c.

Third breach: That the plaintiff had not enjoyed, &c., alleging that, *whilst the plaintiff was seised*, the defendant and his servants, and other persons claiming through the defendant, entered on the

1874

SPOOR v. GREEN.

seams of coal and also certain clay within and under the said two pieces of ground, and worked, got, and carried away the coal and clay, whereby the plaintiff lost the coal and clay, and the land subsided, &c.

[The fourth and fifth breaches complained of disturbance to the plaintiff's enjoyment by the removal of support to plaintiff's land from adjacent lands, by reason of workings of the defendant and persons claiming through him, whereby, &c. There was no finding applicable to these breaches, and they became immaterial.]

Sixth breach: alleging notice to the defendant of the breaches secondly and fourthly assigned, and refusal by him to indemnify plaintiff.

Second count: Repeating the breaches alleged in the first count, with an allegation that defendant knowingly sold and conveyed, and procured to be conveyed, the land for the purpose of houses and buildings being erected thereon.

Plea 1. Non est factum. 2. Denial of breaches. 3. To both counts, so far as relates to the first breach, that Smith and Sharp had not by reason of any act, matter, or thing done or permitted by the defendant, lawful right or title to do what is alleged to have been done by them. 4. To both counts, so far as relates to the second breach, that defendant did not demise to Smith and Sharp as alleged. [5. This plea was to the fourth breach, and is therefore immaterial.] 6. That the supposed causes of action did not, nor did any of them, accrue within twenty years before suit.

Issue on all the pleas, and demurrer to the third plea, and joinder in demurrer.

The question for the opinion of the Court was, whether, on the facts in the case, the plaintiff was entitled to maintain this action in respect of all or any of the causes of action alleged in the declaration?

The case was argued in Trinity Term, 1871, by *Heath* (*Manisty, Q.C.*, with him), for the plaintiff, and by *Quain, Q.C.* (*Kemplay*, with him), for the defendant; and was again argued in Michaelmas Term, 1871, by *Heath*, for the plaintiff, and by *Kemplay*, for the defendant.

For the plaintiff, it was contended that the lease of the 23rd of July, 1844, was an incumbrance created by the defendant, the

1874

SPOOR v. GREEN.

validity of which he could not dispute: Jenkins' Century, p. 255, 6th Century, case 46; *Holmes* v. *Powell* (1); that its existence constituted a breach of the covenant for title: *Levett* v. *Withrington* (2); and also a breach of the covenant for quiet enjoyment, even though nothing were actually done under it in the plaintiff's time, for coal still remained to be worked, and there was power to exercise other rights over the land; that the unlawful act of Smith and Sharp in taking the fire-clay was an active disturbance within the meaning of the covenant, since it was facilitated by their lawful right of entering into the mine, and that at least their taking of the fragments of coal was so, inasmuch as that taking was authorized by the lease: *Morris* v. *Edgington* (3); *Andrews* v. *Paradise* (4); *Shaw* v. *Stenton* (5); that the Statute of Limitations (3 & 4 Wm. 4, c. 42, s. 3) did not apply; nor to the covenant for title, because the existence of the lease was a continuing breach: *Kingdon* v. *Nottle* (6); *King* v. *Jones* (7); nor to the covenant for quiet enjoyment, because even if the existence of the incumbrance was not a breach, a breach was committed by the acts done since the 6th of July, 1847, and therefore within twenty years of the writ; nor to the damage caused by the subsidence, because the cause of action did not arise until the subsidence: *Bonomi* v. *Backhouse* (8); per Willes, J., in the Exchequer Chamber (9); nor to the covenant for indemnity, because the breach did not arise till the refusal to indemnify: *Collinge* v. *Heywood* (10); *Reynolds* v. *Doyle.* (11)

For the defendant it was contended that the benefit of the covenant did not pass to the plaintiff, who took under Jamieson's power of appointment: *Roach* v. *Wadham.* (12)

[THE COURT pointed out that in the present case the use was derived out of the seisin of Jamieson, the covenantee, and that *Roach* v. *Wadham* (12) therefore did not apply.]

Further, that there was no breach of any of the covenants, the

(1) 8 D. M. & G. 572.
(2) 1 Lutw. 317.
(3) 3 Taunt. 24.
(4) 8 Mod. 318.
(5) 2 H. & N. 858; 27 L. J. (Ex.) 253.
(6) 4 M. & S. 53.
(7) 5 Taunt. 418; 4 M. & S. 188.
(8) 9 H. L. C. 503.
(9) E. B. & E. at p. 654; 28 L. J. (Q.B.) 378.
(10) 9 Ad. & E. 633.
(11) 1 Man. & G. 753.
(12) 6 East, 289.

1874

SPOOR v. GREEN.

making of the lease being the act not of the defendant, but of Granger; that if the existence of the lease was a breach of the covenant for title, the breach was committed at the date of the covenant—the lease being already in existence—and was barred by the statute; that there was no such breach of the covenant for quiet enjoyment as was alleged, the entry and the removal of the coal which caused the subsidence having taken place before and not after the plaintiff was seised, so that there was a fatal variance between the breach alleged and the evidence; but that the evidence shewed, in fact, no breach of the covenant at all, the subsistence of the lease not being such, and there having been no disturbance in the plaintiff's time; that if there had been any disturbance on which the plaintiff could have sued, the action was barred by the statute; that as to the fire-clay and the small pieces of coal taken away within the period of twenty years, the taking of the fire-clay was a mere trespass not authorized by the lease, and neither that nor the taking of the small pieces of coal could be included in the allegation of the breach according to its true construction, for that the allegation plainly referred to the taking which followed immediately on the entry under the lease, and which alone caused the subsidence; that the subsidence was the damage really sued for, as appeared from the plaintiff's request for indemnity, which extended to nothing else; that *Bonomi* v. *Backhouse* (1) had no application; for that the minerals, the taking of which there caused the subsidence, were not, as here, in the plaintiff's land, but were under contiguous land, and the ground of decision was that the taking of them was lawful at the time it was done, and gave by itself no cause of action: the only cause of action was the subsequent damage; here the working, if subsequent to the purchase, would have been clearly a breach, and if once sued upon, there could have been no second action: *Nicklin* v. *Williams* (2); that, lastly, there was no breach of the covenant to indemnify, there being nothing in respect of which the defendant was bound to indemnify the plaintiff.

The case again stood over for the purpose of the arbitrator stating additional facts, in pursuance of which he made his supplementary certificate stated above (3); but no further argument took place.

(1) 9 H. L. C. 503. (2) 10 Ex. 259; 23 L. J. (Ex.) 335. (3) Ante, p. 102.

Jan 31, 1874. The following judgments were delivered:— 1874

SPOOR v. GREEN.

CLEASBY, B. The question in this case is, whether the defendant is liable to the plaintiff upon a covenant given by the defendant to one Jamieson and his appointee, for title, for quiet enjoyment, and for indemnity.

The plaintiff had bought two pieces of land of one Jamieson in 1846. Jamieson had bought the land of the defendant, and the defendant had entered into the usual covenants for title and quiet enjoyment, and there was also a covenant to indemnify. The plaintiff sued the defendant upon these covenants, and we disposed in the course of the argument of the objection that the plaintiff could not sue on these covenants by reason of his only being an appointee of Jamieson and not an assignee, holding that in this case the plaintiff could sue upon the covenant, if there was a breach of which he could take advantage.

The declaration sets forth a good cause of action. It alleges that the plaintiff became the purchaser of certain land (which would, of course, include any coal or other mineral underneath it), and that the defendant had made covenants with the plaintiff's vendor and appointor for title and quiet enjoyment, and to indemnify from certain damages; and it further alleges that, after the plaintiff purchased, certain persons, lawfully entitled under a lease derived from the defendant, entered upon the mines and worked them, and took the plaintiff's coal, and that by reason of the coal being so taken and removed, the land of the plaintiff subsided, and a house built upon it was greatly damaged.

But the facts, as found by the arbitrator, in my opinion, entirely displace this cause of action. It appears that all the coal under the plaintiff's land had been worked out before Jamieson sold to the plaintiff, and not only before Jamieson sold, but before he bought, and before the covenant sued on was entered into. It also appears that Jamieson, when he bought, had been through the workings, and knew the coal had been all worked out.

The plaintiff bought of Jamieson the land and all his right, title, and interest in it; he therefore never purchased any of the coal, but only the land without the coal, and the covenants apply only to what was the subject-matter of purchase, and therefore

1874

SPOOR v. GREEN.

there is no breach of covenant for title by reason that the coal had been removed.

Nor is there any breach of the covenant for quiet enjoyment by reason of the taking the coals at the time when they were taken. And it also seems to me impossible to say that there is a breach of covenant for quiet enjoyment by reason of the subsidence of the house in consequence of the previous removal of the coal. This subsidence of the house is a necessary consequence of the condition of the property bought by the plaintiff, and may have been partly caused by the additional pressure caused by building on the ground. It is not any interference by any person with the plaintiff's enjoyment, nor the consequence of any such interference.

Nor is there any breach of the covenant to indemnify, because there is no damage to the plaintiff's interest in the land caused by any estate existing in the land at the time of the purchase. This is not an action for wrongfully depriving the plaintiff's land of the support of the subjacent minerals. If it were, questions of law might arise, as to which the case of *Bonomi* v. *Backhouse* (1), referred to upon the argument of this case, might be an important authority; but it has no bearing upon the case as it stands. Questions of fact would also arise, which the case leaves undecided: for example, whether the removal of the support can be said to be the act of the defendant, who only signed the agreement for Granger.

There are counts connected with the working of the adjoining mine; but these, it was admitted, are out of the case. The subsidence was caused wholly by the coal being removed under the plaintiff's land. It was contended that the subsistence of the lease, or, more properly speaking, the fact that the twenty-one years mentioned in the agreement had not expired, made the agreement of itself an incumbrance, and that the plaintiffs are entitled, at all events, to nominal damages. Independent of the objection of the variance between the statement of the breach and the proof, I cannot think that, if such a lease or agreement was at an end so far as regards the coals under the plaintiff's land,

(1) 9 H. L. C. 503.

it can make any difference that under the same document the lessees are winning coal under different land. It might be a mile off; and how can the accidental circumstance of all the coal under the distant land being worked out or not being worked out determine whether the plaintiff has a cause of action? It is true the agreement gives the lessees the privilege of doing certain things upon the surface necessary for the working the colliery; and if it appeared that any such thing was or could be necessary to be done upon the land of the plaintiff, there might be some ground for regarding the pendency of the agreement as an incumbrance.

The same remark applies to anything which the lessees were authorized to do underground besides taking the coal. The seam of coal, and not the space occupied by the coal, forms the subject-matter of the agreement, and although, as long as any portions of the seams of coal are unworked, the agreement or lease is, properly speaking, subsisting, yet, in the absence of any such statement as I have mentioned, it certainly appears to me that it would be an unreasonable conclusion that it subsisted as to the plaintiff's land in any sense to make it an incumbrance upon it, in respect of which even nominal damages could, upon the facts stated, be recovered. As to the taking of fire-clay in 1848, in my opinion it was unlawful, and could not be regarded as a breach of the covenant for quiet enjoyment.

And there was no damage caused by it so as to make it the subject of the covenant to indemnify. In reality, if fire-clay worth working had been found (as the lease already granted was only a lease of the coal mine) it would have been an addition to the value of the plaintiff's property, as a fresh lease from him would have been required to work it. If the existence of the lease could (contrary to my opinion already expressed) be regarded as a breach of the covenant for title, by reason of its being an incumbrance which diminished the value of the property, then this breach was completed in Jamieson's time. A man must be taken to know what the property is which he buys, unless some deception is practised upon him, for which there is no pretence. The condition of the land must have been known, and the cause of action, if any, in respect of this supposed diminution of value complete in Jamieson, and the plaintiff cannot enforce it. It should be observed

1874

SPOOR v. GREEN.

that the claim is not upon the breach of a covenant for further assurance, as to which the cause of action would arise when the further assurance lawfully demanded was refused.

In my opinion there is no foundation for this action. I think the plaintiff bought a piece of land, the coal having been previously taken from underneath it. He took no covenant to protect him against its subsiding, and therefore must bear the consequence; such a covenant would probably have enhanced the price he had to pay.

BRAMWELL, B. I entirely concur in the judgment of my Brother Cleasby, but wish to add what follows.

There is a variance between the declaration and proof as to the breach of the covenant for quiet enjoyment. That breach is that the plaintiff has not enjoyed, and, on the contrary, Smith and Sharp, to whom defendant had demised, after the conveyance to the plaintiff, rightfully entered and took the coal. This is untrue. The defendant did not demise to Smith and Sharp, and they did not enter and take coal after the conveyance to the plaintiff. I think this variance ought not to be amended. If the facts were truly stated, the plaintiff would at the utmost only be entitled to nominal damages on this breach, supposing the taking of the few loose pieces of coal were a breach. The arbitrator offered to amend on terms which the plaintiff refused; and now, after all the expense and trouble of the cause, he asks, on the hearing of the argument, for amendment. I think we ought in our discretion to refuse it.

I think there is no variance as to the breach of covenant for title. The breach is that the Defendant had not title when he entered into the covenant; the incorrect statement is in the alleged consequence, in the per quod, viz. that Smith and Sharp entered and took coal while the plaintiff was the owner. This is an allegation of special damage resulting from the breach, which, being untruly stated, the plaintiff could not prove; the breach, however, remains, and is correctly stated. But assuming the breach to be correctly stated and proved, I am of opinion that the Statute of Limitations is a bar to it. It was completed, if it ever existed, at the time the deed was executed. If Jamieson had

recovered on it, or released it, no further action on it could have been maintained by him, nor, consequently, by his assignee. It is not what is called a continuing breach, any more than not paying money is a continuing breach. The covenant remains broken indeed, but broken once for all. In the case of a covenant to repair, the breach is continuing, because the covenant is broken afresh every day the premises are out of repair, and when an action is brought for breach of such a covenant, the plaintiff does not recover the value of the repairs, because he may recover again if the want of repair still continues. Nothing like that exists as to this covenant. If the words of the breach are looked at, it will be seen that they are, that neither the defendant nor Pearson had good title, but, on the contrary (and this is the breach), Smith and Sharp at the time of making the deed, and thence continually had title, &c. It is true that the Court in *Kingdon* v. *Nottle* (1) speak of the breach as a continuing breach. Oddly enough, the breach assigned there is express, that the defendant at the time of the execution of the indenture was not seised, &c. But the Court having in the previous case of *Kingdon* v. *Nottle* (2) held that the executor could not maintain an action on this covenant, now held that the real representative could, and it is in reference to this that they use the language I mention.

Bonomi v. *Backhouse* (3) has, in my judgment, no bearing on this case. I can claim to be well acquainted with the ratio decidendi of that case in the Exchequer Chamber. It was an action of tort. There was neither damnum nor injuria till the plaintiff's land was affected. The excavations were not tortious at the time they were made, and never would have become so had those who made them prevented their consequences reaching the plaintiff's land.

Of course the Statute of Limitations would apply to any breach of covenant for quiet enjoyment which took place twenty years before suit.

The sixth breach and the last count follow the fate of the second breach. Moreover, no damnification from the breach alleged is shewn.

For these additional reasons, as well as for those given by

(1) 4 M. & S. 53. (2) 1 M. & S. 355. (3) 9 H. L. C. 503.

809.

1874

SPOOR v. GREEN.

my brother Cleasby, I think our judgment should be for the defendant.

KELLY, C.B. Several questions arise in this case, of which the first in order appears to be, whether the grant of what has been termed the lease, or the agreement for a lease, by Mr. Granger to Smith and Sharp on the 23rd of July, 1844, was a breach of the covenant for title by the defendant upon which this action is founded. The words of this agreement reserving an annual rent of 50*l.*, commencing from the 1st of July then last past, make it to operate as a present demise, and it was so acted on by Smith and Sharp, who entered upon and began to work the mines shortly after the date of the grant. And this agreement, which I shall hereafter call the lease, continued in force for twenty-one years, that is to say, until the 1st of July, 1865. This instrument was signed by the defendant in these terms: "For T. C. Granger, William Green."

The first objection of the defendant is, that the granting of this lease (assuming that it constitutes an incumbrance on the land conveyed to Jamieson, and by him to the plaintiff, and in respect of which the covenant for title was entered into) was not the act of the defendant, but that of Granger alone. The position of the defendant in respect of the land was peculiar; for Granger, who was the real and beneficial owner, executed a conveyance of it to the defendant in 1842, purporting to be a deed of sale of the fee simple in consideration of the sum of 740*l.* But it was agreed between the defendant and Granger that the defendant should have no beneficial interest in the land, but that he should hold it for the benefit of Granger; and accordingly Granger appears to have treated the property as his own, and to have leased the mines to Smith and Sharp, in consideration of rents payable to himself to his own use. It might have been doubtful whether this act of Granger's would have been a breach of covenant by the defendant, but the words of the covenant being "notwithstanding any act, deed, matter, or thing done or permitted by him, the said W. Green," I think, looking to the interest he himself possessed, that by signing this instrument for Granger he permitted and sanctioned or affirmed the grant of the lease to Smith and Sharp

within the meaning of the covenant; and inasmuch as this lease continued in force until, and at, and long after the conveyance to Jamieson and to the plaintiff, and conferred a right upon Smith and Sharp to enter into and work the mines, which right they exercised, I am of opinion that it may be treated as a lease by the defendant himself, and that it constituted a breach of the covenant for title, and an incumbrance upon the land so conveyed, and did not cease so to operate until the expiration of the term in 1865.

The property had been mortgaged to one Boyd, in December, 1842, and the mortgage having been afterwards paid off, it was again mortgaged to George Pearson, who became a party to the conveyance to Jamieson, and in July and August, 1846, Jamieson conveyed by appointment to the plaintiff, who thereupon, as contended by him, became entitled to the benefit of the covenant as assignee. It was indeed objected by the defendant that the plaintiff, having taken the estate by way of appointment only, was not an assignee in law of the covenant, and for this the case of *Roach* v. *Wadham* (1) was cited; but we intimated in the course of the argument that, looking to the terms of the conveyance to Jamieson and the plaintiff respectively, that case was not applicable to the present, and that the benefit of the covenant passed to the plaintiff as assignee.

Smith and Sharp proceeded to work the mines, and continued their operations until the month of August, 1848, and on the 24th of December, 1865, the surface of the ground belonging to the plaintiff subsided, and several houses which had been built upon the land, and which were let at rents amounting to 130*l.* a year, were subverted and greatly damaged, and this action is brought to recover the amount of the damage sustained by the plaintiff. It appears, however, that the working of the mines which occasioned the subversion of the houses in 1865, was complete before July, 1846, when the plaintiff became the owner of the land. Certain other operations took place between July, 1846, and August, 1848, but these were substantially confined to the taking of fire-clay, to which Smith and Sharp were not entitled under the lease, and in respect of which, therefore, the defendant would incur no liability. But as late as 1848 the lessees also took away some small fragments

(1) 6 East, 289.

1874

SPOOR v. GREEN.

of coal, which had fallen from the sides or the walls of the mine, and for which, and for the entry into the mine, although the coal so taken was of no appreciable value, the plaintiff claims at least nominal damages.

Upon these facts five questions arise: 1. Is the plaintiff entitled to recover the amount of the damage arising from the subsidence, which has been caused by the working of the mines before he became entitled to the land? 2. Is he entitled to recover damages for the entering into the mines and the taking of the coal between August, 1846, and August, 1848, after his title to the land had commenced? 3. Is the Statute of Limitations a bar, the working of the mines which caused the subsidence having been complete before July, 1846, and before the plaintiff was possessed, and the action not having been commenced until the 6th of July, 1867? 4. The declaration alleging the working of the mines to have taken place while the plaintiff was the owner of the land, whereas the working which caused the subversion of the houses, as before observed, was complete before the date of his conveyance, the 23rd of August, 1846, is this a fatal variance as far as respects the damages claimed for the subversion of the houses? 5. Was the lease a continuing breach of covenant until its expiration on the 1st of July, 1865; and is the plaintiff therefore entitled at least to nominal damages by reason of the existence of the lease, or of the entry into the mine and the taking of fragments of coal in 1848, and so within the twenty years, under either the covenant for title or that for quiet enjoyment?

The first, third, and fourth questions, and the second and fifth, may be considered together. Upon the first, third, and fourth questions the plaintiff claims substantial damages by reason of the subsidence of his land and the falling of his houses, which took place in the year 1865, notwithstanding the fact found by the arbitrator that the working of the mines before the plaintiff's title to the land accrued in 1846 was the cause of the subsidence, and that such working of the mines was more than twenty years before the commencement of the suit. It is insisted, however, that the plaintiff is precluded even from raising this question by the terms of his declaration, which, in assigning the breach, expressly alleges that Smith and Sharp, "afterwards and whilst the plaintiff remained

and continued seised of the said two pieces of ground so conveyed to him as aforesaid, entered upon the mines and seams of coal within and under the plaintiff's ground, and worked, won, got, and carried away the said coal, whereby the plaintiff lost the said coal, and the surface of the said two pieces of ground subsided with the said houses then built thereon." This averment is that the working of the mines, the cause of the subversion of the houses, took place while the plaintiff was seised of the land, whereas the fact found by the arbitrator is that it was complete before the plaintiff became entitled to the land. And this, as setting forth the very cause of action of which the plaintiff complains, is a material variance, and fatal to this, the essential part of the plaintiff's claim. An application was made to us to amend the declaration by striking out the allegation that the working took place while the plaintiff was possessed; but it was stated by the counsel for the defendant and admitted that, upon a similar application during the arbitration, the defendant was willing to consent to an amendment upon payment by the plaintiff of the costs of the action and the arbitration theretofore incurred, and that this was refused by the plaintiff. Upon these grounds my learned Brethren are of opinion that we ought not now to allow the amendment. I must say that the refusal during the arbitration, and the mistake itself in the pleadings, being the acts of the legal advisers of the plaintiff, and not his own, I should have been disposed, upon payment by the plaintiff of all costs incurred up to the present time, even now to permit him to amend; but the majority of the Court being of a contrary opinion, the amendment cannot be made; and I concur with the rest of the Court in thinking that the variance is fatal. Although, therefore, I am of opinion, on the ground hereafter stated, that the plaintiff is entitled to judgment upon the breach of the covenants for title and for quiet enjoyment, with nominal damages, I agree that there must be judgment for the defendant in respect of all other damages claimed.

It is unnecessary, therefore, to pronounce an opinion on the chief question in the case; but, as a court of appeal may hold the variance immaterial, or may strike out the words which constitute the variance, I think it right to observe that, looking to the case of *Bonomi* v. *Backhouse*, in the Exchequer Chamber and the House

1874

SPOOR v. GREEN.

of Lords (1), but especially to the judgment pronounced by Willes, J., in the Exchequer Chamber (2), I think that the true cause of action in this case is the subsidence of the land and the consequent destruction of the houses in 1865, and that therefore the Statute of Limitations is no bar; and that such subsidence and its results being caused by acts lawfully done by the lessees under the lease, which lease was a breach of the covenants by the defendant, he is responsible for the damage done, and, but for the variance, would be liable for that damage in this action.

Upon the second and fifth questions I am of opinion that this action is maintainable upon the covenant for title in respect of the existence of the lease until 1865, and upon the covenant for quiet enjoyment, by reason of the entering into the mine and taking away the fragments of coal between July, 1847, and August, 1848.

There is a distinction between the covenant for title and the covenant for quiet enjoyment. The covenant for title is broken by the existence of an adverse title in another, as in this case by the lease, its mere existence rendering the land of less value. The covenant for quiet enjoyment is broken only when the covenantee is disturbed, as in this case by the entry into the mine and the taking the fragments of coal in 1848. The deed of purchase having conveyed to Jamieson, and afterwards to the plaintiff, the mines under the land as well as the surface, the covenant of the defendant was that he had good title to the mines. That covenant, I think, was broken as soon as it was made, by reason of his having before become party to a lease of the mines, which lease was then in force. It was a covenant running with the land, and a continuing covenant, and the breach of it by means of the lease was a continuing breach; and although the plaintiff might have sued upon it upon his becoming possessed, and might have recovered the damages he had sustained (if any) by reason of the breach, he was not bound to do so; and I am of opinion that he continued entitled to sue for any damage afterwards sustained, whenever any such should have resulted from the breach; and, finally, that if the Statute of Limitations apply at all to covenants for title, the time of limitation does not necessarily begin to run from the making of the covenant, or of a lease which is a breach of the covenant, and

(1) 9 H. L. C. 503. (2) E. B. & E. at p. 654; 28 L. J. (Q.B.) 378.

7 Jur. N.S. 1809 5 Jur. N.S. 1343.

that it is no bar as long as the lease continues, and any damage, nominal or substantial, is or may be sustained. I do not understand it to be questioned that the conveyance passed the mines as well as the land to the plaintiff, nor that a covenant for title runs with the land, nor therefore that the plaintiff is entitled to the benefit of this covenant, nor that it was broken by the making of the lease. And I am of opinion that he is entitled to sue upon it now, upon the ground that the existence of the lease, until it expired in 1865, was an incumbrance upon the land, and rendered it of less value than if it had not existed; and further, that it made the entry of the lessees lawful, and so enabled them to take the fire-clay from the mine, and although they themselves, and not the defendant, are liable to the plaintiff for the value of the fire-clay taken, it is a damage to the plaintiff that he is put to his action against them, and may incur extra costs in such action, which he could not have been exposed to but for the right of entry conferred upon them by the defendant. I am also of opinion that the entry into the mine and the taking the fragments of coal in 1848 by virtue of the lease, which was within the twenty years, was a breach of the covenant for quiet enjoyment.

The case of *Kingdon* v. *Nottle* (1), upon a covenant for title, and *King* v. *Jones* (2), upon a covenant for further assurance, are authorities to shew that these covenants are continuing covenants, and the breaches of them continuing breaches, and that a right of action accrues toties quoties when and as often as damage actually arises from the breach of either covenant. *Kingdon* v. *Nottle* (3) was the case of a mortgage in fee, and the mortgagor covenanted with the mortgagee and his heirs and assigns that he had good title to convey and was seised in fee. The mortgagee held during his life, and brought no action; after his death his executrix sued upon the covenant for title, and the further covenant for further assurance, assigning for breaches that defendant had no title, and that plaintiff requested him to levy a fine, which he refused. She failed, on the ground that the covenant ran with the land and had passed to the devisee of the covenantee. But in the following year the second case (4) was decided in an action brought by the

(1) 1 M. & S. 355; 4 M. & S. 53.
(2) 5 Taunt. 418; 4 M. & S. 188.
(3) 1 M. & S. 355.
(4) 4 M. & S. 53.

1874

SPOOR v. GREEN.

same person, as devisee of the original covenantee, suing as assignee of the covenant, and assigning for breach that the defendant had no title, and for damage, that the lands were of less value than if there had been a good title, and that she had been prevented from selling them for so large a price as she would have otherwise obtained. There it was argued that, the breach having been in the testator's lifetime, it could not be assigned; that the covenant might pass with the land, but not so the breach, for which the testator and he alone could sue. But it was held that there was a breach also in the time of the devisee, which gave her a right of action upon which she was entitled to sue: Lord Ellenborough observing (1), "The covenant passes with the land to the devisee, and has been broken in the lifetime of the devisee; for so long as the defendant has not a good title there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which not being done the covenant is broken once for all, but is in the nature of a covenant to do a thing toties quoties, as the exigency of the case may require." Here, then, the damage, that the plaintiff was unable to sell at as large a price as she would have obtained if the title had been good, was held to constitute a continuing substantive cause of action, and if the action had been brought at a long subsequent period, and the Statute of Limitations had been pleaded, the time could not have run from any earlier period than the accruing of that action.

And so in *King* v. *Jones* (2), where the covenant was for further assurance, the covenantee in his lifetime called upon the covenantor to levy a fine, and afterwards died, and the plaintiff, his heir, to whom the covenant had passed as assignee, entered upon the premises and was possessed, and was afterwards evicted and brought his action, it was objected that the breach was in the lifetime of the original covenantee, and that he alone was entitled to sue, and that if any action lay after his death it must be by his executors, as the damages belonged to his estate. But, after an elaborate argument and time taken to consider, it was held by the Court of Common Pleas that the action well lay, and that the refusal to levy a fine (the further assurance required) was a breach and a damage to him; that "the ancestor (the original covenantee)

(1) 4 M. & S. at p. 57. (2) 5 Taunt. 418; 4 M. & S. 188.

had required the defendant to perform his covenant, but gave him time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise in him so to do, until the ultimate damage was sustained, for otherwise he could not have recovered the whole value; the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir, who represents the ancestor as to the land, as the executor in respect of personalty." These decisions shew that it is the resulting damage, and not merely the breach of covenant, which gives the right of action.

It is true when these cases were decided there was no statute of limitations expressly taking away the right to sue upon a covenant after a certain number of years from the breach. But the language of the statute is, that no action shall be brought but within twenty years after the action has accrued; and we have only to consider the real nature of the covenant for title, and of the various kinds of breaches of it which may be committed, to see that the Statute of Limitations is wholly inapplicable to such breaches, except where the right of action is upon an eviction of the whole property conveyed, so that there is no land with which the covenant may run, and nothing left upon which the covenant can operate.

In such a case the statute may apply, and from such an eviction the time may begin to run. But in the cases cited, as here, the breach being the grant and continued existence of a lease of a part of the property only, as of the mines and minerals under the land, how can the statute apply? The mine may never be worked at all, so that no damage may ever be sustained; and if an action be brought upon the grant of the lease, only nominal damages may be recovered. But the lease may be for forty years; a quantity of minerals may be taken at the end of ten years, a number of houses on the surface subverted and destroyed in twenty years, and a mansion injured in thirty years.

If these be not separate and substantive causes of action, upon each of which the complainant has at least twenty years to sue, of what use is the covenant in such a case? But suppose another case, covenant for title in a conveyance in fee of a landed estate. It turns out that the covenantor, a year or two before, has sold and conveyed the reversion of one-half of the property at his

1874

SPOOR v. GREEN.

death to A. B., provided A. B. is then living. The covenantor lives for twenty years, and then dies, and A. B. survives him and enters. Upon these facts I apprehend it is not to be doubted that the covenant is broken as soon as it is made; for if the purchaser, the covenantee, were minded to sell the property, or he became bankrupt, and it was of necessity to be sold, it would sell for much less than if there were an indefeasible title in fee simple. But supposing no action to be brought until the death of the covenantor and the entry of A. B., can it be contended that the Statute of Limitations would be a bar? If it be, and the covenantee was ignorant of the conveyance until the death of the covenantor, he loses half his land and has no remedy. And if he hears of it and sues within the twenty years, but in the covenantor's lifetime, how can the jury estimate the damages, in the uncertainty whether the covenantor may not survive A. B., and so that the covenantee will never be disturbed in his title?

I apprehend, therefore, that upon these grounds, and upon all the authorities, the lease in question was a continuing breach of covenant, and that the plaintiff was entitled to his action at any time within twenty years of any damage, whether nominal or substantial, being sustained, by entry into the mine or otherwise, as long as the lease was in force, and consequently from the entry into the mine in 1848, and the taking of the fragments of coal; and further, that the action lies by reason of the mere existence of the lease, which, as conferring a right to enter into the mine and upon the surface, affected more or less the value of the property until it expired by effluxion of time in 1865. I think, therefore, that judgment should be entered for the plaintiff with nominal damages.

Judgment for the defendant.

Attorney for plaintiff: *E. H. De Rhe Philipe, for Brignall, Durham.*

Attorneys for defendant: *S. R. Hoyle, for Thompson & Lisle, Durham.*

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXVII VICTORIA.

SMITH *v.* SMITH. 1874

Judgment—Execution—Reasonable Time. *April* 15.

A party who has signed judgment is entitled to issue execution without waiting for a return of post.

Semble, he is entitled to issue execution immediately, and is not bound to wait a reasonable time.

A VERDICT in this action (which was an action for negligence) having been found for the plaintiff on the 12th of November, 1873, judgment was signed on the postea on the 27th of November, and on the 29th of November, at 11.30 a.m., the taxation of costs (which was attended by the clerks of the respective attorneys) was completed, and the master's allocatur obtained. The clerk to the plaintiff's attorney immediately asked for a cheque in payment, but the clerk to the defendant's attorney was not ready at that moment to pay, and asked for a return of post. (1) The

(1) This was the view taken by the Court of the evidence on affidavit, which was conflicting.

1874

SMITH v. SMITH.

clerk to the plaintiff's attorney thereupon immediately issued a writ of fi. fa. for damages and costs, and handed it to the sheriff's officer, who, in the course of the day, levied under it. This appeared to be done by way of retaliation for an advantage taken, on the other side, of a technical defect in an affidavit, which had caused an adjournment and delay of the taxation.

On the 1st of December an order was made by the master, on a summons taken out by the defendant, setting aside the writ of fi. fa. and all subsequent proceedings, upon terms, with costs against the plaintiff, which the defendant was to be entitled to deduct from the amount due on the judgment. An appeal against this order was dismissed by Grove, J., with costs, under the belief that the order was made by consent.

The defendant afterwards paid the amount of the judgment, after deducting these costs, which amounted to 19*l.* 7*s.* 1*d.*

Thereupon the plaintiff obtained a rule calling on the defendant to shew cause why the order of the master and of Grove, J., should not be rescinded, and why the defendant should not pay to the plaintiff the balance of 19*l.* 7*s.* 1*d.* and the costs of the execution and levy.

Willis and *R. V. Williams* shewed cause. The order was made by consent.

[THE COURT was of opinion on the evidence, and on the statement of the master, that it was not so made.]

The order was rightly made. The execution was issued with undue speed.

[BRAMWELL, B. That would not make it irregular, though it might be a ground for staying the sale under it.]

Perkins v. *National Assurance and Investment Association* (1) is an authority that execution cannot be issued immediately on signing judgment; there must be a default.

[BRAMWELL, B. That was a case on a judge's order, which required that a default should be made. Where there is a judgment you may issue execution, not because there is a default, but because the debt is due as soon as judgment is signed.]

Nevertheless, the party obtaining the judgment must wait a

(1) 2 H. & N. 71; 26 L. J. (Ex.) 182.

reasonable time; the observations of Bramwell, B., in the case cited (1) shew the inconvenience and injustice which a contrary rule would produce. To issue execution suddenly where no special circumstances justify it amounts to an abuse of process which the Court will restrain. It is not pretended that any such circumstances existed here; the execution, therefore, was not issued bonâ fide for the purpose of getting the debt paid, but merely for the purpose of vexation and annoyance; and that is the proper description of abuse of process. [They cited *Grainger* v. *Hill* (2), *Heywood* v. *Collinge* (3), and a case of *Day* v. *South Eastern Ry. Co.*, at Chambers, where Willes, J., made a similar order against a plaintiff who had issued immediate execution, and levied in the board-room of the company.]

[BRAMWELL, B. The only alternative given to the plaintiff here was to wait a return of post; he was clearly not bound to wait so long.]

Lucius Kelly, in support of the rule, referred to Chitty's Practice, vol. i. p. 593 (12th ed.), and to the Common Law Procedure Act, 1852, s. 206.

[He was stopped.]

BRAMWELL, B. This rule must be made absolute. In so deciding we do not overrule the decision of Grove, J., except upon the point of whether the order made by the master was made by consent. That order, we think, was wrong. It is the inclination of my opinion, that a person who has signed judgment may immediately issue execution. This may sometimes lead to unreasonable consequences, because, as I pointed out in *Perkins* v. *National Assurance and Investment Association* (4), there may be no authority in the clerk who attends the taxation to receive the money, and so the defendant cannot possibly prevent the execution from issuing if the attorney for the plaintiff so far forgets himself as to issue it without giving any time to the defendant to tender the amount. If it were necessary to decide this, I should so hold, though before doing so I should like to know the particulars of the

(1) 2 H. & N., at p. 72.

(2) 4 Bing. N. C. 212.

(3) 9 A. & E. 268.

(4) 2 H. & N. at p. 72; 26 L. J. (Ex.) 182.

1874

SMITH v. SMITH.

case at Chambers referred to by Mr. Willis. But it is not necessary to examine that case further, for, after all, it only decides that a reasonable time must be allowed, though what time, and what is the criterion of reasonableness, I am at a loss to know. Perhaps it might be said, so much time as would allow of the clerk communicating with his principal; but I think there is no such rule; it cannot depend on the distance of his place of business from the taxing-office. This is one of those things which is ordinarily regulated by good feeling. I do not remember ever to have known such a case before; which goes far to shew that it is not necessary to lay down a rule.

Here, however, that question does not arise, because the defendant's attorney asked the plaintiff's attorney to wait for a return of post. If he had said, "I insist upon time to go to my employer," it would have been different; but the plaintiff's attorney was not bound to accept the only alternative that was offered him. If the question was between waiting a return of post and issuing execution instanter, he had a right to do it instanter. If such a thing were done without reasonable cause it would be a most unbecoming thing, and would deserve great censure; here, however, a provocation had been given, which may furnish some excuse, though it would have been better not to have acted upon the provocation.

PIGOTT, B. I quite agree with what my Brother Bramwell has said, and with the reasons he has given. I agree with the decision in *Perkins* v. *National Assurance and Investment Association* (1), but this case is not within it. The plaintiff was acting in his strict right; whether altogether with propriety we need not determine.

Rule absolute.

Attorney for plaintiff: *Berridge.*
Attorneys for defendant: *Few & Co.*

(1) 2 H. & N. 71; 26 L. J. (Ex.) 182.

GORRIS AND ANOTHER *v.* SCOTT. 1874

April 22.

Statutory Duty—Contagious Diseases (Animals) Act, 1869.

When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss.

The defendant, a shipowner, undertook to carry the plaintiffs' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, s. 75 :—

Held, that the object of the statute and the order being to prevent the spread of contagious disease among animals, and not to protect them against perils of the sea, the plaintiffs could not recover.

DECLARATION, first count: that after the passing of the Contagious Diseases (Animals) Act, 1869, the Privy Council, in exercise of the powers and authorities vested in them by the Act (s. 75), made an order (called the Animals Order of 1871) with reference to animals brought by sea to ports in Great Britain, and to the places used and occupied by such animals on board any vessel in which the same should be so brought to such ports; and thereby, amongst other things, ordered (1) that every such place should be divided into pens by substantial divisions; (2) that each such pen should not exceed nine feet in breadth and fifteen feet in length; that afterwards and whilst the order was in force the plaintiffs delivered on board a vessel called the *Hastings*, to the defendant as owner of the vessel, certain sheep of the plaintiffs', to be carried by the defendant for reward on board the said vessel from Hamburg to Newcastle, and there delivered to the plaintiffs; and the defendant, as such owner, received and started on the said voyage with the sheep for the purposes and on the terms aforesaid; that all conditions were fulfilled, &c., yet the place in and on board the said vessel which was used and occupied by the sheep during the voyage was not, during the said voyage or any part thereof, divided into pens by substantial or other divisions, by reason whereof divers of the sheep were washed and

1874

GORRIS v. SCOTT.

swept away by the sea from off the said ship, and were drowned and wholly lost to the plaintiffs.

Second count, similar to the first, but setting out a third regulation: "that the floor of each such pen should have proper battens or other foot-hold thereon," and alleging the loss of the sheep as aforesaid to have been caused by the want of such battens.

Demurrer and joinder.

Shield, in support of the demurrer. The statute was made for the furtherance of a public purpose, and not to secure any private benefit, and the observance of its provisions is enforced by a penalty: 32 & 33 Vict. c. 70, s. 103, and *Cullen* v. *Trimble*. (1) Its infringement, therefore, gives no ground for an action.

The preamble of the Act, as well as its whole structure, and s. 75 in particular, under which this order is made (2), shew that the Act is entirely directed to the prevention of contagious

(1) Law Rep. 7 Q. B. 416.

(2) 32 & 33 Vict. c. 70: "Whereas it is expedient to confer on Her Majesty's most honourable Privy Council powers to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, and other animals, by prohibiting or regulating the importation of foreign animals; and it is further expedient to provide against the spreading of such diseases in Great Britain, and to consolidate and make perpetual the Acts relating thereto, and to make such other provisions as are contained in this Act." Part I. (ss. 1–8) is headed "Preliminary;" part II. (ss. 9–14), "Local Authorities;" part III. (ss. 15–30), "Foreign Animals;" part IV. (ss. 31–64), "Discovery and Prevention of Disease;" part V. (ss. 66–74), "Slaughter in Cattle Plague; Compensation;" part VI. (ss. 75–85), "Orders of Council and Local Authorities;" and the rest of the Act relates to the taking of lands, to expenses, and to offences and penalties.

Sect. 75: "The Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes:—

"For insuring for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing:

"For protecting such animals from unnecessary suffering during the passage and on landing:

[Then follow certain inland purposes.]

"And generally any orders whatsoever which they think it expedient to make for the better execution of this Act, or for the purpose of in any manner preventing the introduction or spreading of contagious or infectious disease among animals in Great Britain."

diseases among cattle; and if, under s. 75, the Privy Council had made orders directed to some other purpose, they would have exceeded their powers. The order, then, must be construed with reference to the language of s. 75 and the purpose of the Act, and, so understood, its object is not to secure the owners of sheep and cattle from loss by the perils of the sea, but to protect the country against the introduction and the spread of murrain. This circumstance brings the case within the authority of *Stevens* v. *Jeacocke* (1), and distinguishes it from *Couch* v. *Steel* (2) and *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (3)

Herschell, Q.C. (*J. W. Mellor* with him), contrà. *Stevens* v. *Jeacocke* (1) is distinguishable on the ground that a specific remedy was given by the statute; the present case falls within *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (3), where it was held that the imposition of a penalty which was not intended as a compensation did not exclude the right of action. These precautions must be considered as enacted generally, at least to this extent, that all persons engaged in the importation of animals must be taken to know of the existence of the regulations, and to contract with reference to them. The plaintiffs were entitled to assume that the defendant would perform all the duties cast upon him by the law, including compliance with these orders; and that being so, the defendant has impliedly contracted with the plaintiffs that he would perform them.

KELLY, C.B. This is an action to recover damages for the loss of a number of sheep which the defendant, a shipowner, had contracted to carry, and which were washed overboard and lost by reason (as we must take it to be truly alleged) of the neglect to comply with a certain order made by the Privy Council, in pursuance of the Contagious Diseases (Animals) Act, 1869. The Act was passed merely for sanitary purposes, in order to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact. Under the authority of that Act, certain orders were made; amongst others,

(1) 11 Q. B. 731; 17 L. J. (Q.B.) 163.
(2) 3 E. & B. 402; 23 L. J. (Q. B.) 121. (3) Law Rep. 6 Ex. 404.

18 Jur 515.

1874

GORRIS v. SCOTT.

an order by which any ship bringing sheep or cattle from any foreign port to ports in Great Britain is to have the place occupied by such animals divided into pens of certain dimensions, and the floor of such pens furnished with battens or foot-holds. The object of this order is to prevent animals from being overcrowded, and so brought into a condition in which the disease guarded against would be likely to be developed. This regulation has been neglected, and the question is, whether the loss, which we must assume to have been caused by that neglect, entitles the plaintiffs to maintain an action.

The argument of the defendant is, that the Act has imposed penalties to secure the observance of its provisions, and that, according to the general rule, the remedy prescribed by the statute must be pursued; that although, when penalties are imposed for the violation of a statutory duty, a person aggrieved by its violation may sometimes maintain an action for the damage so caused, that must be in cases where the object of the statute is to confer a benefit on individuals, and to protect them against the evil consequences which the statute was designed to prevent, and which have in fact ensued; but that if the object is not to protect individuals against the consequences which have in fact ensued, it is otherwise; that if, therefore, by reason of the precautions in question not having been taken, the plaintiffs had sustained that damage against which it was intended to secure them, an action would lie, but that when the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs, they cannot maintain an action founded on the neglect. The principle may be well illustrated by the case put in argument of a breach by a railway company of its duty to erect a gate on a level crossing, and to keep the gate closed except when the crossing is being actually and properly used. The object of the precaution is to prevent injury from being sustained through animals or vehicles being upon the line at unseasonable times; and if by reason of such a breach of duty, either in not erecting the gate, or in not keeping it closed, a person attempts to cross with a carriage at an improper time, and injury ensues to a passenger, no doubt an action would lie against

the railway company, because the intention of the legislature was that, by the erection of the gates and by their being kept closed individuals should be protected against accidents of this description. And if we could see that it was the object, or among the objects of this Act, that the owners of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being washed overboard, or lost by the perils of the sea, the present action would be within the principle.

But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but, as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on their way to this country. The preamble recites that "it is expedient to confer on Her Majesty's most honourable Privy Council power to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, or other animals, by prohibiting or regulating the importation of foreign animals," and also to provide against the "spreading" of such diseases in Great Britain. Then follow numerous sections directed entirely to this object. Then comes s. 75, which enacts that "the Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes." What, then, are these purposes? They are "for securing for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing," "for protecting such animals from unnecessary suffering during the passage and on landing," and so forth; all the purposes enumerated being calculated and directed to the prevention of disease, and none of them having any relation whatever to the danger of loss by the perils of the sea. That being so, if by reason of the default in question the plaintiffs' sheep had been overcrowded, or had been caused unnecessary suffering, and so had arrived in this country in a state of disease, I do not say that they might not have maintained this action. But the damage complained of here is something totally apart from the object of the Act of

1874

GORRIS v. SCOTT.

Parliament, and it is in accordance with all the authorities to say that the action is not maintainable.

PIGOTT, B. For the reasons which have been so exhaustively stated by the Lord Chief Baron, I am of opinion that the declaration shews no cause of action. It is necessary to see what was the object of the legislature in this enactment, and it is set forth clearly in the preamble as being "to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, or other animals," and the "spread of such diseases in Great Britain." The purposes enumerated in s. 75 are in harmony with this preamble, and it is in furtherance of that section that the order in question was made. The object, then, of the regulations which have been broken was, not to prevent cattle from being washed overboard, but to protect them against contagious disease. The legislature never contemplated altering the relations between the owners and carriers of cattle, except for the purposes pointed out in the Act; and if the Privy Council had gone out of their way and made provisions to prevent cattle from being washed overboard, their act would have been ultrà vires. If, indeed, by reason of the neglect complained of, the cattle had contracted a contagious disease, the case would have been different. But as the case stands on this declaration, the answer to the action is this: Admit there has been a breach of duty; admit there has been a consequent injury; still the legislature was not legislating to protect against such an injury, but for an altogether different purpose; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose.

POLLOCK, B. I also think this demurrer must be allowed. I agree that it is essential to remember that this action is founded on a contract, a contract between the freighter and the shipowner, and in that respect (and for other reasons also), it differs from the case of *Stevens* v. *Jeacocke* (1), and more nearly resembles *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (2) Now in this state of circumstances it would be open to the plaintiffs

(1) 11 Q. B. 731; 17 L. J. (Q.B.) 163. (2) Law Rep. 6 Ex. 404.

to allege negligence generally on the part of the shipowner, and then the observations would apply which were made in *Blamires* v. *Lancashire and Yorkshire Ry. Co.* (1), where the Lord Chief Baron laid down the law very clearly in terms which were afterwards approved of in the Exchequer Chamber. The whole question would be open to the jury, whether the defendant had been guilty of negligence in omitting to observe a precaution pointed out in the order in question. But here no other negligence is alleged than the omission of that precaution; we must assume that the sheep were washed overboard merely in consequence of that omission, and the question is, whether that washing away gives a cause of action to the plaintiffs. Now, the Act of Parliament was passed alio intuitu; the recital in the preamble and the words of s. 75 point out that what the Privy Council have power to do is to make such orders as may be expedient for the purpose of preventing the introduction and the spread of contagious and infectious diseases amongst animals. Suppose, then, that the precautions directed are useful and advantageous for preventing animals from being washed overboard, yet they were never intended for that purpose, and a loss of that kind caused by their neglect cannot give a cause of action.

AMPHLETT, B. I am of the same opinion.

Judgment for the defendant.

Attorneys for plaintiff: *Pyke, Irving, & Pyke, for H. & J. E. Joel, Newcastle-on-Tyne.*

Attorneys for defendant: *Ingledew, Ince, & Greening.*

(1) Law Rep. 8 Ex. 283.

1874
April 22.

THE GREAT NORTHERN RAILWAY COMPANY *v.* SWAFFIELD.

Carrier—Railway Company—Failure of the Consignee to take Delivery—Lien for Charges.

The defendant sent a horse by the plaintiffs' railway directed to himself at S. station. On the arrival of the horse at S. station at night there was no one to meet it, and the plaintiffs, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse; he was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station-master offered to pay the charges and let the defendant take away the horse; but the defendant declined and went away without the horse, which remained at the livery stable.

The plaintiffs afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm and with payment of a sum of money for his expenses and loss of time.

Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it. In an action brought to recover the amount of the charges:—

Held, that the plaintiffs acted reasonably in putting the horse in the livery stable, and that the defendant, having refused to take the horse, was liable to the plaintiffs for all the livery charges which they had paid.

Appeal from the Bedfordshire county court.

This was an action brought to recover the sum of 17*l.* paid by the plaintiffs to a livery stable keeper for the keep of the defendant's horse, under the following circumstances.

On the 5th of July, 1872, the defendant, who lived at Wootton, fifteen miles from Sandy Station, sent a horse by the plaintiffs' line from King's Cross to Sandy, consigned to the defendant himself at Sandy, the fare being prepaid. When the horse arrived at Sandy, at 10 P.M., there was no one at the station to receive it on behalf of the defendant, and by the direction of the station-master, who did not know the defendant's residence, the horse was taken to a livery stable near the station, kept by one Bennett, for safe custody. Soon after the horse had been placed there the defendant's servant arrived at the station, and, producing the horse ticket which the defendant had received from the plaintiffs, asked for delivery of the horse. The station-master told the servant that the horse

was at the livery stable, and that he could have it on payment of the livery charges, which Bennett's ostler, who happened to be present, stated to be 6*d.* The servant refused to pay this sum, and went across to the stable and demanded the horse of Bennett, who said he might have it on the payment of 1*s.* 6*d.* The servant refused with some insolence to pay any money whatever, on which Bennett said that he should not have the horse except on the payment of 2*s.* 6*d.*, which is the usual and proper charge for one night's keep. The servant thereupon went away without the horse.

On the next morning the defendant came himself, and complained to the station-master (who was not previously aware of what had passed after the servant left the station) of the horse not having been delivered to his servant the previous night. The station-master offered that if the defendant would pay Bennett, and leave the receipt with him, he would represent the case to the superintendent with a view of getting the money from the plaintiffs; but the defendant refused to recognise Bennett in any way. Thereupon the station-master said that, rather than the defendant should go away without the horse, he would pay the charges out of his own pocket; but the defendant declared he would have nothing to do with it, and went away without the horse.

In reply to a letter written the same day by the defendant to the general manager of the plaintiffs, stating that he left the horse in the company's hands, and claiming 21*l.* for the price of the horse, and 30*s.* for his and his man's expenses and loss of time, the station-master wrote to the defendant on the 8th of July, offering to deliver the horse without payment of the livery charges, but stating that the company would look to the defendant for payment of the same. The defendant replied, refusing to come to Sandy for the horse, but offering to receive it if delivered at his farm by one o'clock the next day, free of expense, and with payment of 30*s.* for expenses and loss of time; otherwise he would not receive the horse at all. The station-master, in reply, stated that the horse would remain at the stable at the defendant's risk and expense.

The horse remained at the stables till the 18th of November, when the station-master sent it in charge of a porter to the

1874

GREAT NORTHERN RAILWAY CO. v. SWAFFIELD.

residence of the defendant, who then received and kept it, no demand being then made for payment of the livery charges. The plaintiffs paid the livery charges, amounting to 17*l.*, for which they now sued the defendant.

The case was heard (without a jury) before the learned judge of the county court, who gave judgment for the defendant; the plaintiffs appealed.

The question stated for the opinion of the Court was, whether the plaintiffs were entitled to recover the whole or any part of the livery charges from the defendant; and if the Court should be of opinion that they were so entitled, judgment was to be entered for them for the amount of the charges, or such part thereof as the Court should think fit, with such costs as the Court should direct. (1)

J. P. Aspinall, for the plaintiffs, having stated the case, the Court called on

Graham, for the defendant. The plaintiffs were in the wrong in refusing to deliver the horse to the defendant's servant without payment of the livery charges. When they placed the horse in the livery stable they ceased to hold it as carriers, and held it only as livery stable keepers or warehousemen, and in that capacity they had no lien for the charges incurred: *Judson* v. *Etheridge* (2); *Orchard* v. *Rackstraw*. (3) They might have left the horse in the horse-box; but, admitting that what they did was a reasonable thing to do, they were still in the wrong in detaining the horse, and had no right afterwards to require the defendant to send for him, and their doing so was a continued refusal to deliver. If the livery stable keeper had a right to refuse delivery, the plaintiffs must be answerable for his refusal, for they had no right to make any contract with him which disabled them from delivering the horse; he was, in effect, only their agent. But if the

(1) The defendant had previously brought an action against the plaintiffs for the detention of the horse; the plaintiffs paid money into Court in respect of the detention of the horse before the defendant's refusal to receive him. The cause was tried before Bramwell, B., at the Bedford Summer Assizes, 1873, and a verdict was found for the then defendants, the now plaintiffs.

(2) 1 C. & M. 743.

(3) 9 C. B. 698; 19 L. J. (C.P.) 303.

horse was out of their hands, so as to free them from the necessity of making any further delivery, then the only implied contract of the defendant was not with them, but with the livery stable keeper. In either event they cannot succeed in their action. The utmost they can recover in any case is the charge incurred before the refusal to deliver.

[POLLOCK, B., referred to *Cargo ex Argos*. (1)]

KELLY, C.B. We are all clearly of opinion that this judgment must be set aside, and judgment entered for the plaintiffs for 17*l*. It appears that the defendant caused a horse to be sent by the plaintiffs' railway to Sandy station; but the horse was not directed to be taken to any particular place. The owner ought to have had some one ready to receive the horse on his arrival and take him away; but no one was there. It does not appear that there was at the station any stable or other accommodation for the horse; and the question arises, what was it, under those circumstances, the plaintiffs' duty, and consequently what was it competent for them to do? I think we need do no more than ask ourselves, as a question of common sense and common understanding, had they any choice? They must either have allowed the horse to stand at the station—a place where it would have been extremely improper and dangerous to let it remain; or they must have put it in safe custody, which was what in fact they did in placing it in the care of the livery stable keeper. Presently the defendant's servant comes and demands the horse. He is referred to the livery stable keeper, and it may be (I do not say it is so) that upon what passed on that occasion the defendant might have maintained an action against the plaintiffs for detaining the horse. (2) But next day the defendant comes himself; the charges now amount to 2*s*. 6*d*.; an altercation takes place about this trumpery sum, and ultimately the station-master offers to pay the charges himself if the defendant will take the horse away; but the defendant refuses and leaves the horse at the stable. Then a correspondence ensues between the parties, in which the defendant is told that he can have the horse without payment if he sends for it, but he refuses, and says that unless the horse is sent

(1) Law Rep. 5 P. C. 134. (2) See note (1), ante, p. 134.

1874

GREAT NORTHERN RAILWAY CO. v. SWAFFIELD.

to him with 30*s.* for expenses and loss of time by to-morrow morning he will not accept it at all; and he never sends for the horse. Meanwhile the plaintiffs run up a bill of 17*l.* with the livery stable keeper with whom they placed the horse, which they ultimately have to pay; and at last they send the horse to the defendant, who receives it; and they now sue him for the amount so paid.

I am clearly of opinion that the plaintiffs are entitled to recover. My Brother Pollock has referred to a class of cases which is identical with this in principle, where it has been held that a shipowner who, through some accidental circumstance, finds it necessary for the safety of the cargo to incur expenditure, is justified in doing so, and can maintain a claim for reimbursement against the owner of the cargo. That is exactly the present case. The plaintiffs were put into much the same position as the shipowner occupies under the circumstances I have described. They had no choice, unless they would leave the horse at the station or in the high road to his own danger and the danger of other people, but to place him in the care of a livery stable keeper, and as they are bound by their implied contract with the livery stable keeper to satisfy his charges, a right arises in them against the defendant to be reimbursed those charges which they have incurred for his benefit.

PIGOTT, B. I am of the same opinion. I do not think we have to deal with any question of lien. We have only to see whether the plaintiffs necessarily incurred this expense in consequence of the defendant's conduct in not receiving the horse, and then whether, under these circumstances, the defendant is under an implied obligation to reimburse them. I am clearly of opinion that he is. The horse was necessarily put in the stable for a short time before the defendant's man arrived. I give no opinion on what then passed, whether the man was right, or whether the plaintiffs were right; I think it is not material. On the following day the defendant comes himself; and the basis of my judgment is, that at that time the station master offered, rather than the defendant should go away without the horse, to pay the charge out of his own pocket; but the defendant declared he would have nothing to do with it, and went away. That I

understand to be the substance of what was proved; and if that be so, it shews to me that there was a leaving of the horse by the defendant in the possession of the carriers, and a refusal to take it. Then what were the carriers to do? They were bound, from ordinary feelings of humanity, to keep the horse safely and feed him; and that became necessary in consequence of the defendant's own conduct in refusing to receive the animal at the end of the journey according to his contract. Then the defendant writes and claims the price of the horse; and then again, in answer to the plaintiffs' offer to deliver the horse without payment of the charges, he requires delivery at his farm and the payment of 30*s.*; in point of fact, he again refuses the horse. Upon the whole, therefore, I come to the conclusion that, whoever was right on the night when the horse arrived, the defendant was wrong when, on the next day, he refused to receive him; that the expense was rightly incurred by the plaintiffs; and that there was, under these circumstances, an implied contract by the defendant entitling the plaintiffs to recover the amount from him.

POLLOCK, B. I am of the same opinion. If the case had rested on what took place on the night when the horse arrived, I should have thought the plaintiffs wrong, for this reason, that although a common carrier has by the common law of the realm a lien for the carriage, he has no lien in his capacity as warehouseman; and it was only for the warehousing or keeping of this horse that the plaintiffs could have made any charge against the defendant.

But the matter did not rest there; for it is the reasonable inference from what is stated in the case, that on the next day, when the defendant himself came, he could have had the horse without the payment of anything; but he declined to take it, and went away. Then comes the question, first, What was the duty of the plaintiffs, as carriers, with regard to the horse? and secondly, If they incurred any charges in carrying out that duty, could they recover them in any form of action against the owner of the horse? Now, in my opinion it was the duty of the plaintiffs, as carriers, although the transit of the horse was at an end, to take such reasonable care of the horse as a reasonable owner would take of his own goods; and if they had turned him out on the highway, or allowed him

1874

GREAT NORTHERN RAILWAY CO. v. SWAFFIELD.

to go loose, they would have been in default. Therefore they did what it was their duty to do. Then comes the question, Can they recover any expenses thus incurred against the owner of the horse? As far as I am aware, there is no decided case in English law in which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or consignor of goods. But in my opinion he is so entitled. It had been long debated whether a shipowner has such a right, and gradually, partly by custom and partly by some opinions of authority in this country, the right has come to be established. It was clearly held to exist in the case of *Notara* v. *Henderson* (1), where all the authorities on the subject are reviewed with very great care; and that case, with some others, was cited and acted upon by the Privy Council in the recent case of *Cargo ex Argos*. (2) The Privy Council is not a Court whose decisions are binding on us sitting here, but it is a Court to whose decisions I should certainly on all occasions give great weight; and their judgment on this point is clearly in accordance with reason and justice. It was there said (3) (after referring to the observations of Sir James Mansfield, C.J., in *Christy* v. *Row* (4)), "The precise point does not seem to have been subsequently decided, but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined." Then, after citing the cases, the judgment proceeds: "It results from them, that not merely is a power given, but a duty is cast on the master, in many cases of accident and emergency, to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing." That seems to me to be a sound rule of law. That the duty is imposed upon the carrier, I do not think any one has doubted; but if there were that duty without the correlative right, it would be a manifest injustice. Therefore, upon the whole of the circumstances, I come to the conclusion that the claim of the company was a proper one, and that the judgment of the learned judge of the county court must be reversed.

(1) Law Rep. 7 Q. B. 225, at pp. 230–235.
(2) Law Rep. 5 P. C. 134.
(3) Law Rep. 5 P. C., at p. 164.
(4) 1 Taunt. 300.

1874

GREAT NORTHERN RAILWAY CO. v. SWAFFIELD.

AMPHLETT, B. I am of the same opinion. It appears to me that this case, though trumpery in itself, involves important principles. I think it is perfectly clear that the railway company, when the horse arrived at the station, and no one was there to receive it, were not only entitled but were bound to take reasonable care of it. As a matter of common humanity, they could not have left the horse without food during the whole night, and if they had turned it out on to the road, they would not only have been responsible to the owner, but if any accident had happened to the general public, they would have incurred liability to them. Therefore, as it appears to me, there was nothing that they could reasonably do except that which they did, namely, send it to the livery-stable keeper to be taken care of.

Then comes the question discussed by my Brother Pollock, and on which I should not dissent from him without great diffidence, whether a lien existed for these charges. As at present advised, I should not wish to be considered as holding that in a case of this sort, the person who, in pursuance of a legal obligation, took care of a horse and expended money upon him, would not be entitled to a lien on the horse for the money so expended. But really the point does not arise; whatever might be the case with regard to it, that question appears to me to be got rid of by what followed; because, even if the company were wrong in claiming payment of the 6*d*., or whatever the sum might be, on the night when the horse arrived, the whole thing was set right by them on the next day, when the defendant himself came to the station, and the station-master offered to pay the charge in order that the defendant might have the horse. The defendant refused that very reasonable offer; and what, then, was the company to do with the horse? What else should they do but leave it with the livery-stable keeper, where it was being taken care of? At last, after a bill of 17*l*. had been incurred, the horse was sent to the defendant, and the question is, who is to pay that sum of 17*l*.?

Now, who was in the wrong? Even if the plaintiffs were in the wrong originally, of which I am by no means sure, in not giving up the horse on the night when it arrived, at any rate from the time when that was set right it was the defendant who was in the wrong, and the company who were in the right. It appears

1874

GREAT NORTHERN RAILWAY CO. v. SWAFFIELD.

to me, therefore, quite clear that the company are entitled to recover the money which they have been obliged to pay, and have paid, to the livery-stable keeper, and that the judgment of the learned judge of the county court must be reversed, and judgment entered for the plaintiffs.

Judgment reversed.

Attorneys for plaintiffs: *Johnston, Farquhar, & Leach.*
Attorney for defendants: *W. Rogers.*

May 5.

THE ATTORNEY GENERAL *v.* PRATT.

Probate Duty—Assets within the Jurisdiction—Bills of Exchange.

P., resident in India, directed his bankers there to realise certain securities, and transmit the proceeds to his bankers in England. The securities were realised, and the proceeds transmitted in bills of exchange payable six months after sight, and drawn by a bank in India upon a bank in London in favour of the testator's English bankers. Whilst the bills were on their way to England, P. died in India. The bills were received by his bankers in England and were accepted, and the proceeds were in due course collected by the bankers and were received by the defendant, whom the testator had appointed his executor in England, and who had taken out probate here:—

Held, that probate duty must be paid on the amount of the bills.

INFORMATION for probate duty. The information and answer stated the following facts:—

Archdeacon Pratt, of Calcutta, in or shortly before December, 1871, intending to return to England, instructed the Bank of Bengal, at Calcutta, to realise certain securities of his in India, and remit the proceeds to Coutts & Co., bankers, London.

The Bank of Bengal realised the securities, and remitted the proceeds accordingly in five bills of exchange, all dated prior to the 28th of December, made payable six months after sight, and drawn by the Chartered Mercantile Bank of India on the London Joint Stock Bank in favour of Coutts & Co. The bills amounted altogether to 9241*l.* 6*s.* 9*d.*

The bills were so remitted prior to the 28th of December, and on that day Archdeacon Pratt died in India, having by his will and a codicil appointed the defendant executor in England, and another person executor in India.

1874

ATTORNEY GENERAL v. PRATT.

The bills arrived in January, 1872, and the proceeds were collected by Coutts & Co., and were, after probate, received by the defendant.

On the 20th of September, 1872, the defendant proved the will and codicil in England; the personal estate was sworn under 300*l.*, and probate duty was paid on that amount, the defendant contending that no more duty was payable.

The Crown claimed further duty on the amount of the bills.

Sir R. Baggallay, A. G., Holker, S. G., and *W. W. Karslake*, for the Crown. It must be admitted that, according to the principles laid down in *Attorney General* v. *Hope* (1), probate duty cannot be claimed on "foreign funds" only because the probate is ultimately made available for their collection. But it cannot be said that these bills or their proceeds were in any sense foreign funds. If the bills are treated as assets, they were on their way to this country at the time of the testator's death, and actually reached England before the probate was granted. They were taken by virtue of the English probate, and could not be taken by virtue of any other; and to say that from the mere circumstance of their being on the high seas at the time of the testator's death, and out of every other jurisdiction, they are exempt from probate duty, would amount to saying that if a testator were to die at sea in his own yacht, with all his property on board, no probate duty would be payable on the estate. But if not the bills, but what they represented, are treated as the assets, then it is still more clear that probate duty is payable. They were drawn on a bank in England; if they had been accepted at the testator's death, no objection could possibly have arisen; but, though not yet accepted, they represented funds in the hands of the drawees, the existence of which is shewn by the fact that the drawees did accept, and in due course paid them. If the funds were not in England, it is impossible to say where they were; for it certainly cannot be said that the drawing of a bill shews funds in the hands of the drawer; on the contrary, it shews a claim by the drawer upon the drawee, and amounts in effect to an assignment of that claim to the person in whose favour the bill is drawn. If accept-

(1) 1 C. M. & R. 530; 8 Bli. N. R. 44.

1874

ATTORNEY GENERAL v. PRATT.

ance were refused this might shew that the claim had no existence, or at least displace the inference of its existence; but when the bill is accepted the claim is shewn to be real. At the time, therefore, of the testator's decease this claim belonged to Coutts & Co. on behalf of the testator, and was equivalent to assets in their hands belonging to the estate. The claim of the Crown is supported by *In the Goods of Wyckoff* (1), where administration was granted by the Court of Probate of assets, including unaccepted bills of exchange, belonging to and in the possession of the deceased, an American citizen, who died on board a British ship on the high seas bound for this country. [They also referred to *Attorney General* v. *Bouwens* (2) and *Perry's Executors* v. *The Queen.* (3)]

Manisty, Q.C., and *Hemming*, for the defendants. The test of whether probate duty is payable is, not whether the assets cannot be obtained without probate, nor whether funds are ultimately transmitted to this country to be administered here, but what was the local situation of the assets at the time of the testator's death. This is clearly laid down in *Attorney General* v. *Dimond* (4), the principle of which, after being at first doubted, was finally established by *Attorney General* v. *Hope* (5), and is treated as settled by law in Williams on Executors, vol. i. p. 619, 7th ed. The reason of it is that probate only relates to the assets which were within the jurisdiction of the Ordinary at the time of the testator's death. If, therefore, the bills were the assets, they were certainly not within the jurisdiction, for the Ordinary never asserted title to property on the high seas: Williams on Executors, vol. i. p. 364, 7th ed. But if (which is the more correct view) it is not the bills that constitute the assets, then it is the debt represented by the bills. Now it is clear that where assets consist of simple contract debts, their locality is the place where the debtor resides, as was decided in the case of a bill in *Yeoman* v. *Bradshaw.* (6) The case, therefore, of *Attorney General* v. *Bouwens* (2) has no application, for that case related to bonds, which are treated as being themselves assets. The question is,

(1) 3 Sw. & Tr. 20.
(2) 4 M. & W. 171.
(3) Law Rep. 4 Ex. 27.
(4) 1 C. & J. 356.
(5) 1 C. M. & R. 530; 8 Bli. N. R. 44.
(6) Holt (Ca. temp.), 42.

where was the debtor? The only person who was in any sense a debtor was the drawer of the bills, who had, by drawing the bill, entered into an obligation to pay the amount, if the drawee either did not accept or did not pay; and the drawer was in India.

[PIGOTT, B. But where was the actual fund which the bills represented?]

In India. It certainly cannot be assumed that bills drawn payable six months after sight represented funds at that time in the hands of the drawees. But if it is doubtful where the funds were, the Crown cannot succeed; for the onus is on the Crown to shew affirmatively that the assets *were* within their jurisdiction, and that onus is not satisfied by shewing conjecturally that they might be. The case of *In the Goods of Wyckoff* (1) is no authority, as the point did not arise there, and there was no opposition.

KELLY, C.B. I am of opinion that the Crown is entitled to judgment. The result of all the authorities is, that where assets are beyond the jurisdiction at the time when the right to the duty attaches, duty is not payable on them; when they are in England at the time when the duty attaches, duty is payable. The case of *Attorney General* v. *Hope* (2) conclusively establishes this proposition. What, then, constituted the assets in the present case? Actually and de facto the bills in question were on the high seas. Now I do not know whether the point has ever been determined, but I am clearly of opinion that where property belonging to a British subject is on the high seas, and probate is taken out in this country, that property forms part of the estate and effects of the deceased subject to probate duty; otherwise the inconceivable result would follow, that if a person were to sail out in his yacht with valuable property on board, and died on the high seas, duty would not be payable on the yacht and the valuable property on board, on the ground that it was not at the time of death within the jurisdiction, though not within any other. I should in such a case decide without hesitation that such assets were part and parcel of the assets of the deceased in England, and as such liable to probate duty.

Now, considering the nature of the bills of exchange which

(1) 3 Sw. & Tr. 20. (2) 1 C. M. & R. 530; 8 Bli. N. R. 44.

1874

ATTORNEY GENERAL v. PRATT.

constituted the assets, on two grounds I am of opinion that the bills or the money they represented were assets subject to probate duty. In the first place, it is a fallacy to consider bills of exchange only under the notion of debts. There was in truth, at the time of the testator's death, no debt whatsoever from any person. The bills were drawn in India on a bank in London, but they had not reached maturity, they had not been accepted, they had not been even presented. There was, therefore, no debt; but I think they were nevertheless property and assets, on the simple ground that they were personalty in respect of which trover might have been maintained by the executor long before any debt or any debtor in respect of them existed. They were personal chattels of great value; and the lawful owner of them could, on the day after the decease of the testator, have sold them for something very little short of their full value. They were, therefore, assets belonging to the executor to which probate duty attached.

But, secondly, on the ground which has been chiefly adverted to by my learned Brothers, I am clear that the bills, or rather the money, property, or debt represented by them, are liable to probate duty, namely, on the ground that where assets consist of debts, they are assets where the debtor resides. There may, at first sight, seem to be some difficulty in applying this principle to the case, because at the time of probate no debt was due from any one. The drawer would only be under a liability in the event of the bill being dishonoured; the drawee was under no liability, because he had not yet accepted the bill; there was, therefore, no actual debtor in existence. We are therefore driven to see who in fact became the debtor and provided and paid the money. Now the bills were presented for acceptance in due time; they were accepted and paid at maturity; the only persons, therefore, who ever became debtors were the acceptors. They were resident in London, and the money came to hand in London; the assets, therefore, were in London.

Another question might have arisen (which might be subject to different considerations) if the drawees had refused to accept, or had not paid at maturity. That question is not raised here, and I shall not further advert to it.

1874

ATTORNEY GENERAL v. PRATT.

Whether we consider the chattels as upon the high seas at the time of the testator's decease, or consider the locality of the debtor in London as governing the case, the matter is, to my mind, free from doubt, and our judgment must, therefore, be for the Crown.

PIGOTT, B. I am of the same opinion. The law as to probate duty is clearly laid down in the case of *Attorney General* v. *Hope*. (1) "The words of the Act," says Lord Brougham, "refer not to the use eventually made of the probate, but distinctly to the purpose for which the probate was granted. The words of the schedule are to be the rule upon the present occasion; and they do not appear to me to shew that, though the probate has been eventually, de facto, made available to collect foreign funds, that circumstance is any test whatever in trying whether or not this case of foreign funds comes within the schedule." Therefore the question comes to be, whether the proceeds of the bills were at the time of the decease within the jurisdiction. Let us look at the existing state of things. Archdeacon Pratt had ordered the Bank of Bengal to realise certain securities, and to transmit the proceeds to Coutts' Bank in London. The bank had realized the securities, and purchased with the proceeds bills of exchange on London, all drawn in December, 1871, and before the death of the testator, and payable six months after sight. As far as the Bank of Bengal was concerned, they were no longer in any sense debtors of the deceased; they had done what they were employed to do, and had put the assets in the course of transmission to England. Now these bills might never have been accepted, and, if so, a liability would have arisen in the drawers; but this state of things did not arise, and we must put an ordinary construction on the transaction. The meaning of drawing a bill is, that the person on whom it is drawn has the money of the drawer either actually in his hands, or by arrangement in account, which is the same thing. Are we, then, to assume that the bills were properly or improperly drawn upon the London Joint Stock Bank? We must assume that they were properly drawn, as in fact the events have turned out. The effect is, that when the bills were drawn in

(1) 1 C. M. & R., at p. 560; 8 Bli. N. R., at p. 57.

1874

ATTORNEY GENERAL v. PRATT.

Calcutta upon London it was known that the money was in London; and in fact the bills come over and are duly accepted and paid. The à priori inference and the result correspond. What Lord Abinger says in *Attorney General* v. *Bouwens* (1) is applicable: "as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found." Here the real debtor on the 28th of December, 1871, was the London Joint Stock Bank. The bills of exchange were not themselves debts, but the evidence of title to debts, and the assets were with the debtors, the London Joint Stock Bank.

AMPHLETT, B. I am of the same opinion. The law is settled that we must look at the place where the assets are at the time of the decease. Here the assets are represented by the bills of exchange, which were then on their passage from India to England; but when the nature of a bill of exchange is considered, it will appear that they represent, but do not constitute, the assets. The testator had ordered his agent to pay money of his to a bank in London. If this order had not been complied with, the testator would have had a right of recourse to the drawer. But if it was complied with, and if either money or credit, which is what is represented by the bills of exchange, was in London, then the assets were in London. If it had been otherwise, then the assets would have been in India; but the proper construction of the existing circumstances is, that the assets were in England. Therefore, without going into the question as to whether property on board ship would be assets in England, which does not arise, and on which I say nothing, I am of opinion that our judgment must be for the Crown.

Judgment for the Crown.

Attorney for the Crown: *The Solicitor of Inland Revenue.*
Attorneys for defendant: *Perkins & Weston.*

(1) 4 M. & W. 171; at p. 191.

STOCK AND OTHERS *v.* HOLLAND. 1874

May 8.

Bankruptcy Act, 1869, *s.* 87—*Seizure and Sale—Payment to Sheriff to avoid Sale—"Proceeds of such Sale."*

The sheriff having seized the goods of a trader debtor under an execution for more than 50*l.*, the debtor, before sale, paid him, on the 18th of November and the 21st of November, two sums of 100*l.* and 32*l.* respectively, on account of the debt. The judgment creditors knew of and assented to the payments. The debtor, on the 24th of November, filed a petition for liquidation, and a restraining order was served on the sheriff, who continued to hold the sums so paid on account. Subsequently, on the 20th of December, trustees were appointed, who claimed the 132*l.*:—

Held, that the judgment creditors, having assented to the payments, were entitled to the money as against the trustees.

Ex parte Brooke (Law Rep. 9 Ch. 301) followed.

THE plaintiffs signed judgment in this action for 201*l.* 16*s.* 1*d.* on the 13th of November, 1873. Execution was issued on the same day. The sheriff seized the defendant's goods on the 14th. On the 18th the defendant (who was a trader) paid 100*l.* to the sheriff on account of the debt, and promised to pay the balance in a day or two. On the 20th of November the defendant saw one of the plaintiffs and told him of the payment, and begged that the execution might be withdrawn. The defendant also stated that his difficulties were only temporary, and that he would pay the balance due in two months. The plaintiffs agreed to grant his request on condition of his obtaining a surety to guarantee payment. This the defendant promised to do, and it was arranged that he should go the next day to Derby with the plaintiffs' solicitor to see the proposed surety. Next day, however, he telegraphed to the solicitor to postpone the journey until the day following. On the same day, the 21st, he paid 32*l.* more to the sheriff on account of the debt. On the 24th he filed a petition for liquidation in the Derbyshire County Court, and an order restraining the sale was served on the sheriff. No part of the goods seized had then been sold. The first meeting of creditors was held on the 20th of December, and two trustees were appointed, who, on the 22nd, demanded the sum of 132*l.*, which still remained in the hands of the sheriff. The sheriff thereupon took out an interpleader summons, upon the

1874

STOCK v. HOLLAND.

hearing of which, before Bramwell, B., a special case was directed to be stated, under the Common Law Procedure Act, 1860, s. 15, for the opinion of the Court. The affidavits used upon the hearing at Chambers, and which set forth the facts above stated, were ordered to constitute the special case. The question for the opinion of the Court was whether the plaintiffs were entitled to the sum paid to the sheriff by the debtor on account of his debt as against the trustees under the liquidation.

The case was first argued in Hilary Term last, before Kelly, C.B., Cleasby and Amphlett, BB., when judgment was reserved until the decision of the Court of Appeal in Bankruptcy upon an appeal then depending from the decision of Bacon, C.J.B., in *Ex parte Brooke*. The Lord Chancellor and Lords Justices heard the appeal on the 30th of January and the 13th of February last, when the decision of the Chief Judge was reversed. (1) The Court of Exchequer then directed this case to be reargued.

May 7, 8. *Arthur Charles*, for the plaintiffs. There is no question as to fraudulent preference in this case, and the only section of the Bankruptcy Act, 1869, under which the trustees can claim is the 87th. (2) But here the money paid cannot in any sense be considered as the proceeds of seizure and sale. There was no sale; and although, according to *Ex parte Rayner* (3), seizure without sale gives the trustee a title to the goods seized, the section cannot give him a title to money paid to avoid a sale of the goods as well as to the goods themselves. There is evidence that the plaintiffs knew of the payment, and assented to the sheriff holding the money for them, at the same time promising the debtor to withdraw the execution upon certain conditions. The money, therefore, was money received to their use in the sheriff's hands: *Morland* v. *Pellatt*. (4) Moreover, *Ex parte Brooke* (1) is decisive. There it

(1) Law Rep. 9 Ch. 301.

(2) The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87, enacts that, "where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l*., and sold, the sheriff shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served upon him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale after deducting expenses, on trust, to pay the same to the trustee."

(3) Law Rep. 7 Ch. 325.

(4) 8 B. & C. 722.

1874

STOCK v. HOLLAND.

was held that money paid to the sheriff to avoid seizure after the creditors had assented to the sheriff holding it, belonged to them, and not to the trustee. Here there was a seizure, but the principle of the decision applies.

Francis Turner, contrà. The circumstance that there had been a seizure distinguishes the present case from *Ex parte Brooke*. (1) The title of the trustees to the goods themselves, although there has been no sale, cannot be disputed. A sale, therefore, is not indispensable to the operation of sect. 87. The goods seized had ceased to belong to the debtor, and the money which he paid to release them must be taken to have been received by the sheriff for him, and accordingly passed also to the trustees. There is no sufficient evidence to warrant the conclusion that the plaintiffs had absolutely assented to the payments in such a sense as to constitute the sheriff their agent. Indeed, according to James, L.J., in *Ex parte Pearson* (2), the payment itself being made by the debtor to avoid a sale, is equivalent to a sale.

KELLY, C.B. In this case the sheriff had seized the debtor's goods under an execution, and the debtor, in order to prevent a sale, paid the sheriff two sums, of 100*l.* and 32*l.*, on account of the debt. The evidence is clear that these payments came to the knowledge of the creditors, and they delayed the sale of the goods seized in consequence. If no communication had been made to them, a question might have arisen as to whether payment to the sheriff was equivalent to payment to the creditors. But that question does not arise here; and it seems to me that the case of *Ex parte Brooke* (1) is in principle identical with the present case. We are bound by that authority, and I may add that it is one which commends itself to my mind as having been rightly decided.

It is argued that the payment is really equivalent to a sale. But that cannot be. The trustees have a good title to the goods seized, but they now want to have both money and goods. Clearly they are not entitled to the money where the payment of it to the sheriff is assented to by the creditors.

The payment is not contended to have been by way of fraudulent preference. There was pressure, there was consideration for

(1) Law Rep. 9 Ch. 301. (2) Law Rep. 8 Ch. 667, at p. 672.

1874

STOCK v. HOLLAND.

the payment, namely, the delay in completing the execution, and the debtor was not contemplating bankruptcy. Unless, therefore, s. 87 of the Bankruptcy Act, 1869, is applicable, the plaintiffs are entitled to the money. But for the reasons I have given I do not think this money is in any sense "proceeds of the sale" within the meaning of that section.

CLEASBY, B. I am of the same opinion. I think that *Ex parte Brooke* (1), which is a binding, and to my mind, satisfactory authority, concludes this case. There money was paid before seizure to the sheriff to prevent the execution being levied, and the Chief Judge decided (2) that money so paid was in the sheriff's hands as the officer of the Court. But, on the appeal, it appeared that the execution creditor had assented to the mode in which the money had been paid, and thereupon the Court of Appeal reversed the Chief Judge's decision. It is said the case is distinguishable from the present one on two grounds. First, there was a seizure here. But I do not think this makes any difference. The money was paid here, as it was there, to prevent the execution from being completed and, as soon as it was assented to, became the money of the creditor. Secondly, it is contended that the plaintiffs never absolutely assented to the payment, and in one sense, no doubt, the assent was conditional upon the defendant doing something which he failed to do. But it was an absolute assent for the time, and amounted to an agreement on the plaintiffs' part that, in consideration of the part payment of the debt, and of the defendant's undertaking to get a surety and pay the balance in two months, they would stay the execution. Upon the authority, therefore, of *Ex parte Brooke* (1), I think the plaintiffs are entitled to judgment.

AMPHLETT, B., concurred.

Pigott, who appeared for the sheriff, applied that the costs of the sheriff incurred at Chambers and on the argument might be paid by the trustees. The Court refused the application.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Vizard, Crowder, & Anstie.*
Attorney for trustees: *Dubois.*

(1) Law Rep. 9 Ch. 301. (2) Law Rep. 9 Ch. 302, n (1).

TRELOAR *v.* BIGGE.

1874
April 24.

Landlord and Tenant—Covenant not to assign—Arbitrary Refusal—Qualified Covenant.

A lessee covenanted with the lessor not to assign the demised premises without the consent in writing of the lessor, "such consent not being arbitrarily withheld;" and it was provided by the lease that if the lessee should assign the premises without the consent in writing of the lessor, "but such consent is not to be arbitrarily withheld," the lessor might re-enter:—

Held, that there was no covenant by the lessor, either express or implied, not to refuse his consent arbitrarily, but that an arbitrary refusal would leave the lessee at liberty to assign without the lessor's consent.

Semble, by Kelly, C.B., and Pollock, B. An "arbitrary" refusal is equivalent to an "unfair and unreasonable" refusal; and a refusal "upon advice," though the grounds of refusal be not specified, is not "arbitrary."

DECLARATION that the defendant, by deed, demised to the plaintiff premises at 67, Ludgate Hill, for twenty-one years, from the 25th December, 1864, subject to a covenant that the plaintiff would not assign or underlet the premises, or any part thereof, without the consent in writing of the defendant, and that the defendant covenanted with the plaintiff that he would give such consent when the same should be reasonably required, and would not arbitrarily withhold the same; that the plaintiff was desirous of letting part of the premises, and applied for the defendant's consent, and all conditions, &c., were fulfilled, yet the defendant refused his consent and arbitrarily withheld the same.

The defendant pleaded, denying the covenant and the breach.

Issue.

The cause was tried at the sittings in Middlesex after Michaelmas Term, 1873, before Kelly, C.B., when the following facts were proved:—

The plaintiff was tenant to the defendant of premises at No. 67, Ludgate Hill, London, upon the terms of a lease, dated the 18th of January, 1865, for twenty-one years from the previous Christmas. The lease contained the following covenant:—

"And the said Thomas Treloar [the plaintiff] doth covenant with the said T. E. Bigge [the defendant] that he shall not nor will assign this present lease, or let, &c., or otherwise part with

1874

TRELOAR v. BIGGE.

the premises hereby demised, or any part thereof, without the consent in writing of the said T. E. Bigge, such consent not being arbitrarily withheld."

The proviso for re-entry, which immediately followed the covenant, was in these terms:—"Provided, always, that if the said T. Treloar shall at any time assign, let, &c., the said premises, or any part thereof, without the consent in writing of the said T. E. Bigge first had and obtained, but such consent is not to be arbitrarily withheld, then it shall be lawful for T. E. Bigge to re-enter."

In March, 1870, the plaintiff applied to the defendant for leave to underlet a part of the premises to the National Provincial Plate Glass Company for one year. The defendant had meanwhile become aware that the Commissioners of Sewers for London would require the premises, although no formal notice to treat had then been served; and on the 26th of March he replied, "upon advice," that "he could not agree to the plaintiff's proposition, under the altered circumstances of the probable tenure" of his property. The plaintiff's solicitors renewed the application, and requested the defendant to re-consider the matter. He replied, adhering to his former resolution. The underletting, he said, would be no profit to him, and, if the city authorities took the property, merely an advantage to the plaintiff. The premises were afterwards taken by the Commissioners of Sewers, under 57 Geo. 3, c. xxix. The plaintiff now claimed 150*l.* as damages, which he alleged he had sustained through the defendant's "arbitrary" refusal to consent to the proposed underletting. The learned judge asked the jury whether the refusal by the defendant was arbitrary, and on this point they found for the plaintiff. But being of opinion that the words in the lease did not constitute a covenant on the defendant's part, and that if they did, there was no evidence to justify the finding of the jury, the learned judge directed a nonsuit to be entered, with leave to move to enter a verdict for the plaintiff for 150*l.* In Hilary Term last a rule was obtained accordingly, upon the ground that the lease contained either expressly or by implication the covenant declared upon, and that there was evidence to go to the jury that the consent of the plaintiff had been arbitrarily refused.

1874

TRELOAR v. BIGGE.

April 23. *J. Brown, Q.C.*, and *Lumley Smith* shewed cause. First, there is no covenant on the defendant's part such as is declared on. In *Wolveridge* v. *Steward* (1), the principle governing this case is laid down thus: "It is fully established that no precise form of words is necessary to constitute a covenant. 'Any words which shew an agreement to do a thing make a covenant;' but it must be clear that they are meant to operate as an agreement, and not merely as words of condition or qualification." It is impossible to say that the words in the covenant by the plaintiff not to assign, taken alone, are more than words of qualification. Their effect is to leave the tenant at liberty to assign without the landlord's consent, if such consent be arbitrarily withheld. But it will be contended that the proviso for re-entry contains an express covenant by the defendant. It is, however, merely a repetition of the qualification, and limits the right of entry to the case of the tenant having assigned without the defendant's consent in writing, such consent not having been arbitrarily withheld. Secondly, there has been no arbitrary refusal here. The defendant refused after consideration and "upon advice." He was not bound to declare his reasons for refusing: *In re Gresham Life Assurance Society.* (2)

Day, Q.C., and *Petheram*, in support of the rule. The words of the covenant constitute a covenant in express terms by the defendant not arbitrarily to withhold his assent. And if this be doubtful as to the covenant, the proviso is unambiguous. There the words are contained in a separate clause, "but such consent is not to be arbitrarily withheld." This is more than a qualification upon the defendant's right of re-entry. It is within the principle which has been referred to, and amounts to a distinct agreement not to withhold consent arbitrarily. If this be so, there was evidence to support the finding of the jury. The defendant refused "upon advice," but he gave no reason whatever, and the circumstances of the case disclose none. *In re Gresham Life Assurance Society* (3) is not applicable. There the directors had power to refuse transfers of shares unless the transferee was "approved of," and they acted as arbitrators in the matter. But here the jury were

(1) 1 C. & M. 644, at p. 657.
(2) Law Rep. 8 Ch. 446, per Mellish, L.J. at p. 451.
(3) Law Rep. 8 Ch. 446.

1874

TRELOAR v. BIGGE.

justified in supposing that the defendant was acting from mere caprice. In *Marshall* v. *Bishop of Exeter* (1), an allegation in a plea to a declaration in quare impedit that the defendant (the bishop) had "good reason" to believe that the presentee had been guilty of an ecclesiastical offence was held insufficient. So here the defendant ought to have given his grounds for refusing his assent. In *Sheppard* v. *Hong Kong and Shanghai Banking Corporation* (2), a very similar clause was conceded to be a covenant by the lessor, and it was there held that strong grounds for refusing assent must be established. Again, the word "arbitrary" must be interpreted with reference to the proposed assignee, to whom there could be no possible objection in this case.

Cur. adv. vult.

April 24. KELLY, C.B. Two questions arise in this case, the first being whether certain words introduced in the clause prohibiting assignment, and whereby the plaintiff covenants not to assign without licence in writing, amount to an absolute covenant on the part of the lessor not to withhold his consent arbitrarily. I am of opinion that they do not constitute a covenant on which the lessee can sue, but are words, the only effect of which is to qualify the generality of the phrase into which they are introduced. The plaintiff covenants that he will not assign the lease or the premises demised "without the consent in writing of the said T. E. Bigge" (the defendant) "first had and obtained," and if the words stopped there the tenant's covenant would be absolute, but they are qualified by the words "such consent not being arbitrarily withheld." Now the rule of law, no doubt, is that any words in a deed which impose an obligation upon another amount to a covenant by him; but the words must be so used as to shew an intention that there should be an agreement between covenantor and covenantee to do or not to do a particular thing. I cannot find any such intention here. The words, taken grammatically, do not seem to me to amount to an undertaking by the lessor, but are a part of the same sentence as that containing the lessee's covenant, and qualify its generality. They prevent that covenant

(1) Law Rep. 3 H. L. 17.

(2) 20 W. R. 459.

operating in any case of arbitrary refusal on the part of the lessor, that is, in any case where, without fair, solid, and substantial cause, and without reason given, the lessor refuses his assent. I have known in my own experience several cases in which actions have been brought for the arbitrary withholding of consent by a landlord. But in all (as in the case of *Sheppard* v. *Hong Kong and Shanghai Banking Corporation* (1)) there was a covenant in express terms, so as to give the lessee a right of action. In the present case, for the reasons I have given, I think there was no such covenant.

Then it is contended that a covenant is contained in the proviso, and it is quite possible that if the words there used, and on which reliance is placed, had been used in another part of the deed, they might have been properly construed as amounting to a covenant. But the two clauses which follow each other must be taken together. The language is somewhat varied in the proviso, but substantially is to the same effect as that used in the covenant. It shews the description of refusal which is to give the right of re-entry. The qualified covenant not to assign is followed by the qualified covenant for re-entry.

The conclusion I have arrived at upon the construction of the deed renders it unnecessary to decide the question of arbitrary refusal. But I think it right, nevertheless, to express my opinion upon it, and in my judgment there was no evidence of any arbitrary refusal. The lessor took advice upon the subject, and acting upon that advice, refused his assent. It is impossible to say, when the circumstances of the case are considered—the nature of the property and the duration of the lease—that the defendant's act was arbitrary. It has been said that the refusal must be taken to be arbitrary if the character of the proposed assignee is such as cannot be objected to on any reasonable grounds. But I cannot assent to that view. The covenant is not qualified in that manner, as it might have been, and I think the defendant was entitled to refuse his assent upon any fair and reasonable ground. Now, here was an Act which enabled a public body to take possession of the premises, and the defendant knew they intended to take them. It might be an advantageous thing to be able to give the corporation

(1) 20 W. R. 459. W.N. (1872) 66

1874

TRELOAR v. BIGGE.

early possession. It is an every-day matter in compensation cases for an extra sum to be paid for such possession, and the defendant might well desire not to assent to the coming in of an assignee, who would not, of course, be as willing as the assignor to give up the premises. He would be buying them for occupation, while the old tenant, by the very act of wishing to assign, had shewn that he did not care to occupy any longer. It cannot be said that under such circumstances the refusal was arbitrary; that is, unfair and unreasonable. It might certainly be to the advantage of the defendant, and indirectly it would benefit the plaintiff too, who would, by reason of the non-assignment, receive compensation for his interest in the term. Upon both grounds, therefore, I think the rule should be discharged. My Brother Pollock concurs in this judgment.

AMPHLETT, B. The first question in this case is whether the lessee has any right of action on the covenant declared upon, and I am of opinion that he has not. It may be that the words themselves might, if it were necessary to carry out the intention of the parties, be sufficient to raise a covenant by implication in the lessor. But no such obligation ought to be implied if the true intention of the parties can be carried out by adopting a literal and natural construction. Now, looking at the place in which the words relied on occur, I think they ought to be construed as a qualification on the covenant of the lessee. That covenant is in derogation of his common law rights, and it is more convenient and reasonable to hold that the words were introduced to limit the generality of the covenant than to hold them to impose an obligation on the lessor. The true interpretation of the words, I think, is to release the plaintiff from his covenant not to assign without the plaintiff's assent, if that assent is arbitrarily withheld. If that be so they cannot be construed as creating a cross liability. They either qualify the tenant's covenant, or they create a covenant on the landlord's part. They cannot do both. If they create a covenant the result would be that, even although there was an arbitrary refusal, the lessee would be unable to assign without incurring a forfeiture. If he did assign he would be liable to eviction, and yet would have an action accrued to him

1874

TRELOAR v. BIGGE.

against his landlord in respect of the arbitrary refusal. Such a construction would be highly inconvenient, and there is nothing in the words which renders it necessary so to construe them. The other construction is the more convenient. The lessee may assign, if the lessor arbitrarily refuses his assent, without any assent, and the arbitrary refusal would be an answer to any proceedings which might be taken against him. The lessor, on the other hand, would escape a continual liability to a cross action. Upon the second question I feel some doubt. It has been fully discussed by my Lord; but as it is unnecessary to our decision, I do not desire to express any opinion upon it.

Rule discharged.

Attorneys for plaintiff: *Hyde & Tandy.*
Attorney for defendant: *Dobie.*

WILLIAMS *v.* THE GREAT WESTERN RAILWAY COMPANY.

April 17.

Duty to fence—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 47, 61—26 & 27 *Vict. c.* 92, *s.* 6—*Public Footpath crossed on the Level—Evidence of Negligence.*

The defendants' line crossed a public footpath on the level; but the defendants had not erected any gate or stile, as provided by 8 & 9 Vict. c. 20, s. 61.

The plaintiff, a child of four years and-a-half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train:—

Held, that there was evidence to go to the jury that the accident was caused by the neglect of the defendants to fence.

ACTION brought to recover damages for personal injuries suffered by the plaintiff through the defendants' negligence.

The cause was tried before Keating, J., at the Denbighshire Summer Assizes, 1873, and the following facts appeared:—At the place where the accident occurred the defendants' line ran for some distance on the level across a piece of open ground, and for a space of about 150 yards was wholly unfenced. At a point in this unfenced part it was crossed by a public carriage road on the level, and at another point, about thirty yards off, by a public footpath,

1874

WILLIAMS v. GREAT WESTERN RAILWAY CO.

also on the level, which struck off from the road some little distance before it reached the line.

On the 22nd of December, 1871, the plaintiff, a child of four and-a-half years old, was found lying on the rails by the footpath, with one foot severed from his body. There was no evidence to shew how the child had come there, beyond this, that he had been sent on an errand a few minutes before from the cottage where he lived, which lay by the roadside, at about 300 yards distance from the railway, and farther from it than the point where the footpath diverged from the road. It was suggested on the part of the defendants that he had gone along the road, and then, reaching the railway, had strayed down the line; and on the part of the plaintiff, that he had gone along the open footpath, and was crossing the line when he was knocked down and injured by the passing train. The learned judge thought there was no evidence to go to the jury of liability on the defendants, and nonsuited the plaintiff, reserving leave to him to move to enter a verdict for 250*l.*, the amount at which the jury had, by consent, assessed the damages, if there was any evidence for the jury in support of the declaration. (1)

A rule having been obtained accordingly,

McIntyre, Q.C., and *Horatio Lloyd*, contended that there was no act of negligence on the part of the defendants to which the accident could be attributed; that they were not bound to maintain a watchman at the footpath: *Stubley* v. *London and North-Western Ry. Co.* (2); that if there had been a watchman at the road, it could not be assumed that he would have seen what was going on upon the footpath; that a want of the usual warning, or an intimation of safety at the public road, might affect those coming by the high road, *Stapley* v. *London, Brighton, and South Coast Ry. Co.* (3), but not those coming by the footpath; that if

(1) The declaration contained four counts—1. Alleging negligence in the defendants in not placing gates at a public carriage way crossed by the railway, nor watching it; 2. In not taking reasonable care for the protection of persons using a public highway crossed by the railway; 3. In not fencing the railway from the adjoining land; 4. In negligently managing the railway, and the trains running thereon.

(2) Law Rep. 1 Ex. 13.

(3) Law Rep. 1 Ex. 21.

the child got on to the line by the high road, and then strayed down the line to where he was injured, he was simply a trespasser, and not in any sense lawfully on the line; that if there had been a gate or stile at the footpath, and the child went that way, there was no reason to say that he would have been stopped or turned back; and that the case was simply, like that of *Singleton* v. *Eastern Counties Ry. Co.* (1), an unexplained accident.

Morgan Lloyd, Q.C., and *English Harrison*, for the plaintiff, contended that in *Singleton* v. *Eastern Counties Ry. Co.* (1) the plaintiff was wrongfully upon the railway, and no negligence was shewn in the defendants; that here the plaintiff was rightfully on the railway, and there was ample evidence of negligence, none of the precautions prescribed by 8 & 9 Vict. c. 20, ss. 47, 61, and 26 & 27 Vict. c. 92, s. 6, having been observed (2); that the only question was whether that negligence could be reasonably connected with the accident; that in determining this, all the circumstances must be taken into account; that in a way open to the public the safety of the whole public is to be considered, and that of the weakest and least capable most; that although 8 & 9 Vict. c. 20, s. 47, mentions cattle, the precautions enacted by it were not directed to the safety of animals, either exclusively or chiefly, but to the safety of human beings, and especially of the infirm and the young; that s. 61 does not even mention cattle; that if such a warning and protection as is afforded by a gate or stile had existed on the footpath, the child would very probably have been stopped altogether, or would at least have been checked long enough to see his danger; and that there were therefore circumstances which could not be withdrawn from the jury, and on which they would have been entitled to find for the plaintiff.

(1) 7 C. B. (N.S.) 287.

(2) By 8 & 9 Vict. c. 20, s. 47, when a railway crosses a public carriage road on the level, the company are to erect and maintain gates across the road, and to employ persons to open and shut the gates, which are, when closed, to fence in the railway and prevent cattle or horses from entering the railway; and by s. 61, when a railway crosses a public highway other than a public carriage way on the level, the company are, if the way is a bridle way, to erect and maintain gates, and if a footway, gates or stiles.

By 26 & 27 Vict. c. 92, s. 6, when a railway crosses a public carriage road on the level, the company are to erect and maintain a lodge, and keep a proper person to watch or superintend the level crossing.

1874

WILLIAMS v. GREAT WESTERN RAILWAY CO.

KELLY, C.B. My mind has fluctuated, but I have finally come to the conclusion that the true question is as Mr. Harrison put it, not so much whether there was negligence on the part of the company (as to which there is no doubt), but whether that negligence was so connected with the accident to the plaintiff as to entitle a jury to be consulted as to whether the action is maintainable.

The facts are, that a child, of tender years but of sufficient age to be able to cross the line by itself, was found on the footpath at the level crossing with its foot severed from its body, and the questions are, first, whether there was any negligence on the part of the defendants which could have contributed to the accident; secondly, whether such negligence was the cause of the accident.

As to the first point, it is impossible to imagine a case where negligence is more clearly made out, or more inexcusable. A carriage-way of considerable width passed over the line on a level, and about thirty yards distant from this a footway crossed the line, also on a level. There was a clear statutory duty to have gates on both sides of the carriage-way, which ought to be kept closed except when animals or vehicles are crossing the line; and as to the footpath, it was equally required for the protection of the public that a gate or stile should be placed at each side of the railway. Both these duties were left unperformed. This was clearly negligence. I say nothing more as to the carriage-way, because there is no evidence by which it is possible to connect the negligence of the company in this respect with the accident. But the law also required a gate or stile to the footpath for the protection of the public, and perhaps peculiarly for the protection of human beings less able than ordinary persons to take care of themselves, as infants or infirm persons; but nothing of the kind was done. Now, it is very possible that the existence of a gate or stile upon the footpath might have prevented the child from going on, or might have detained him long enough to prevent this accident from happening. It is true these are only possibilities; but being such, and negligence being established in the defendants, the question is whether, considering the short time which had elapsed since the child left home, and all the other

circumstances of the case, a jury may not have been very well satisfied that one or other of those possibilities would have happened, and that if a stile or gate had been there this accident would not have occurred.

I do not say that it is not a case of difficulty, but it is one which might well have been submitted to the jury, and under these circumstances the rule must be made absolute to enter the verdict for the plaintiff for the sum assessed by the jury.

POLLOCK, B. The question in this case is whether there was any evidence that ought to have been left to the jury. I should be sorry to think that we were extending the rule on the subject of negligence which was laid down by Willes, J., in the case of *Daniel* v. *Metropolitan Ry. Co.* (1), in terms which were approved of in the Exchequer Chamber and the House of Lords (2), although the decision was itself reversed. "It is not enough for the plaintiff to shew that there has been an accident upon the defendants' line, and thence to argue that the company are liable even primâ facie. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also shew with reasonable certainty what particular precautions should have been taken."

Can we, consistently with the rule so laid down, hold that there was evidence which might have been submitted to the jury? Now as to there being a non-performance of what was enjoined by the Act of Parliament, there is no doubt about it; and it is not for us to speculate on what was the precise intention of the legislature when they required that there should be a gate or stile on a footpath crossing on a level. It is sufficient to say that the defendants have neglected to comply with the enactment.

Then can it be inferred with reasonable probability that the accident occurred by reason of this negligence, so as to make this a question for the jury? I was at first impressed with the view

(1) Law Rep. 3 C. P. 216, at p. 222.
(2) Law Rep. 3 C. P. 591; Ibid. 5 H. L. 45.

1874

WILLIAMS v. GREAT WESTERN RAILWAY CO.

that this was like the case in which it has been held that where there is an even balance of the evidence, so that no inference can be properly drawn one way more than the other, the judge must not leave the question to the jury. The real question is (as Mr. Harrison put it), whether the negligence can reasonably be so connected with the accident as to allow of a jury saying that it did in fact give occasion to it. Upon the whole, I think that there was evidence which might be left to the jury, and the rule must therefore be made absolute.

AMPHLETT, B. My opinion has fluctuated during the argument, but I have come to a conclusion satisfactory to my own mind that the verdict should be entered for the plaintiff. We start with the fact that the defendants have failed to comply with the express provisions of the statute, and this is an act of gross negligence. I think nothing turns on the neglect at the carriage-way. But the child was in fact found upon the footway, and the proper presumption is that it met with the accident on the footway, and whilst it was crossing the line. Then the child being lawfully on the footway, and the defendants being guilty of a breach of duty, the only question is whether there is reasonable ground for connecting this breach of duty with the accident. It is not necessary to decide this as a jury; it is enough to say that I think it was clearly a case which ought to be submitted to a jury. There are many supposable circumstances under which the accident may have happened, and which would connect the accident with the neglect. If the child was merely wandering about, and he had met with a stile, he would probably have been turned back; and one at least of the objects for which a gate or stile is required is to warn people of what is before them, and to make them pause before reaching a dangerous place like a railroad. The rule must be made absolute.

Rule absolute.

Attorneys for plaintiff: *Kennedy & Hughes, for Jones, Wrexham.*
Attorneys for defendants: *Young, Maples, & Co.*

THORN *v.* THE MAYOR AND COMMONALTY OF THE CITY OF LONDON.

1874
May 4.

Engineering Contract—Plans and Specification—Mode of Construction—Impossibility of Execution in Mode specified—Implied Warranty.

The defendants being about to erect a bridge, an engineer prepared for them, at their request, certain plans and specification both of the bridge and of the mode in which it was to be constructed. The plaintiff, on the faith of these plans and specification, and without any independent inquiry whether the work could be done as specified, entered into a contract with the defendants to do it in accordance with the terms of the plans and specification. After the plaintiff had incurred great expense, it was found that the work could not be executed in the manner specified. The plaintiff sued the defendants on the ground of an implied warranty by them that the work could be executed in the manner described in the plans and specification:—

Held, that no such warranty could be implied.

Affirmed in Ex. Ch. 10 L.R. 112. Lyell v. Ho. 18 Jur. (N.S.) 120

SPECIAL CASE stated for the opinion of the Court.

The declaration alleged that the defendants guaranteed and warranted to the plaintiff that Blackfriars Bridge could be built according to certain plans and a specification then shewn by the defendants to the plaintiff, without tidework, and in a manner comparatively inexpensive, and that certain caissons shewn on the said plans would resist the pressure of water during the construction of the said bridge, whereby the plaintiff was induced to contract with the defendants for the construction of the said bridge for a certain sum of money far less than he otherwise would have done; and the plaintiff, relying on the said warranty, commenced the said bridge; whereas the said bridge could not be built according to the said plans and specification and without tidework, and the said caissons would not stand, whereby the plaintiff was compelled to expend divers large sums of money in endeavouring to build the said bridge and lost all the profits he otherwise would have realised in building the same.

The facts of the case were as follows: By the Blackfriars Bridge Act, 1863, the defendants were authorized, among other things, to pull down and remove the then existing Blackfriars Bridge and the works connected therewith, and to construct a new bridge and certain other works, as therein mentioned, across the river Thames; and they were further authorized to appoint a committee to carry the

1871

THORN v. MAYOR, &C., OF THE CITY OF LONDON.

Act into execution; and it was enacted that such committee should have such or so many of the powers and authorities and discretion by that Act given to and reposed in the corporation as the corporation should think fit or proper to delegate to such committee. Shortly after the passing of the Act the corporation duly appointed a committee, and delegated to them all the powers of the corporation under the Act. The committee employed Mr. Joseph Cubitt as their engineer, and a specification and plans and drawings of the proposed works were prepared by him. (1)

The following are such portions of the specification as are material:—

By clause 1 of the specification the contract was to include the whole work to be executed, as shewn in the various plans or described in the specification, as well as all contingent works which, in the opinion of the engineer, were thereby implied, or were requisite for the due completion of the work shewn and described as to be executed under the contract.

By clause 11 the engineer was to be at liberty to vary the dimensions or position of the various parts of the works to be executed under the contract, without the contractor being entitled to any extra charge for such alteration, provided the total quantity of work should not thereby be increased or diminished; but if any greater or less quantity of work should be required, the contractor was to be bound to execute the same, and the addition or deduction, as the case might be, would be valued according to the schedule of prices to be delivered in the lump sum tender; and in case of any works not provided for in that schedule, then to be valued according to the schedule of the Government Board of Works in force at the time.

By clause 12 the contractor was bound, under penalty, to complete the whole of the work included in the contract within three years from the date when the work commenced.

By clause 26 and following clauses allowance was made for extras, but the question of payment was to be referred to the engineer, whose decision should be final and binding.

By clause 30 the contractors were to take out their own quantities.

(1) Both parties were at liberty on the argument to refer to any of these documents.

Clause 36 referred to plans and sections of the then existing bridge and the works executed thereon, and continued thus: "They give all the information possessed respecting the foundations. These plans are believed to be correct, but their accuracy is not guaranteed, and the contractor would not be entitled to charge any extra should the work to be removed prove more than is indicated on these drawings."

10 Ex 122

By clause 54 the contractor was to satisfy himself as to the nature of the ground through which the foundations were to be carried; it was stated that all the information given on this subject was believed to be correct, but was not guaranteed.

10 Ex 122.

By clause 63 the foundations of the piers were to be put in by means of wrought-iron caissons, as shewn in the drawing.

By the 64th and following clauses and the drawings referred to, the quantity of iron to be used in the caissons, the form and dimension of the ironwork, and the mode of making them watertight by means of india-rubber, were detailed, and directions were given for lowering the caissons and getting them closed. By clause 77 all risk and responsibility involved in the sinking of these caissons was to rest with the contractor.

On the 5th of March, 1864, the committee issued an advertisement inviting tenders for the execution of the works comprised in the above-mentioned specification and plans, in which it was stated that the plans and specification might be seen, and further particulars obtained, upon application at the office of the engineer.

In consequence of this advertisement, the plaintiff and his brother and partner, Peter Thorn (since deceased) on the 22nd of April, 1864, sent in a tender to the corporation. Their tender was accepted, and a contract was afterwards, on the 24th of May, 1864, executed under seal by the contractors of the one part and the corporation of the other part, which, so far as is material, was as follows:

By this deed it was agreed that the contractors should execute, in a substantial manner, under the superintendence and according to the directions and to the satisfaction of the engineer, all the works of every description which should be required to be made, done, and executed in and about or connected with the pulling down and removing the existing Blackfriars Bridge, with its piers, abutments, stairs, and approaches, and the building and constructing the pro-

1874

THORN v. MAYOR, &c., OF THE CITY OF LONDON.

posed new bridge across the River Thames at Blackfriars, including all piers, stairs, and approaches and carriage-way and footways over the same bridge, and adjoining thereto on each side up to the contract line according to the specifications prepared by the engineer and the drawings referred to in the said specification, and generally the whole of the works shewn on the said drawings or described or mentioned in the said specification, and also all contingent works which in the opinion of the engineer were implied thereby or requisite for the due completion of the works aforesaid, and should execute the works thereinbefore mentioned under and subject to the directions, rules, regulations, explanations, and instructions mentioned or referred to in the specification, and that with such alterations (if any) as might from time to time, in manner thereinafter mentioned, be directed by the engineer.

That the contractors should make good any settlement, &c., which might happen to the new bridge or any of the works until the expiration of three calendar months from the date of the final certificate to be given by the engineer.

That the works should be commenced immediately after an order for that purpose, signed by the engineer, should have been given to the contractors, and after possession should have been given to the contractors of the ground on which the works were to be executed, and that they should be completed within three years from that time, unless hindered or delayed as thereinafter mentioned.

That the contractors would execute all the works for £269,045*l.*, to be paid in manner thereinafter mentioned, increased or diminished by such sums as should become payable, or should have to be deducted, as thereinafter provided, in respect of alterations or variations in the works.

That it should be lawful for the engineer of the committee at any time or times during the progress of the works, to vary the dimensions or position of various parts of the works to be executed without the contractors being entitled to any extra charge for such alterations, provided the total quantity of work should not be increased or diminished thereby. But in case any greater or less quantity of work should be required by the engineer, the addition or diminution should be valued as therein mentioned.

That the contractors would execute and complete the works ac-

cording to every alteration and variation notified in writing by the engineer, and in the manner and within the time in and within which such works ought to be completed according to the true intent of the deed, or, in case the said works or any of them should be increased, then within such further or extended time (if any) as the engineer should certify by writing under his hand to be proper, and no such alteration or variation should vacate or lessen the validity of any of the covenants or agreements contained in the deed on the part of the contractors to be observed or performed, but such sum of money should be added to or deducted from the said sum of 269,045*l.* as should be estimated to be a fair proportionate addition or deduction to be allowed for such alterations or variations, as before mentioned.

That the contractors would guarantee the stability of all the works, notwithstanding the same might have been done with the approbation of the engineer, and would forthwith and without delay make good all damage which might happen to the works during their progress, and would make satisfaction for all damages sustained by third persons arising out of the execution of the works, and indemnify the defendants against claims in respect of such damage.

That in case they should, without the happening of any of such causes or excuses for delay as therein mentioned, fail to complete the works within three years, computed from the date of the order to proceed, they should be allowed further time for the purpose of completing the same upon the terms of the aforesaid sum of 269,045*l.*, being reduced by a reduction after the rate of 1000*l.* per calendar month for each and every month during which, or any fraction of which, the works should remain uncompleted after the expiration of the three years, such deduction being considered and accepted as an equivalent for the accommodation of the longer period thus allowed for the completion of the works, subject to a proviso that no deduction should be made, nor should any damages be payable for or in respect of such time as the engineer should by writing under his hand certify that the works had been delayed or suspended by reason or in consequence of bad weather, or inevitable accident, or other circumstances not avoidable by the exercise of reasonable care, skill, or diligence on the part of the contractors,

1874

THORN v. MAYOR, &c., OF THE CITY OF LONDON.

or by or in consequence of any order of the engineer, or in consequence of any strike occurring amongst workmen after the commencement of the works.

The corporation did not nor did the committee at any time interfere in any way directly or indirectly with the engineer in his dealings with the contractors, or with their mode of conducting the works, or with any alterations in or additions to the plans and drawings.

The work was commenced by the contractors on the 7th of June, 1864, and by the following October had advanced far enough to enable them to begin putting in the foundations of the piers. They proceeded with this work in strict accordance with the specification and the drawings. The caissons were duly constructed, and the proper measures were taken for preparing the ground and for lowering and sinking the caissons; but it was then found necessary to strengthen them by introducing additional iron girders and temporary internal struts and other supports. These alterations were made by order of the engineer, and by this means the difficulties were overcome, and the caissons were sunk to the full depth shewn on the drawings.

After the separate caissons for forming one of the piers of the new bridge (as so altered and added to) had been lowered and sunk, and the foundations put in up to the level of the top of the permanent plates, it was found necessary, in consequence of the caissons not being of sufficient strength to resist the pressure of the water, to take away the two upper tiers of temporary plates, and to cut off the dam timbers to the top of the second plates. This brought the top of the caissons considerably below high-water mark; and it became necessary to build the rest of the pier by tide work.

By the original plan (if practicable) the water of the river when once pumped out would have remained excluded (very little pumping being thenceforth needed to keep the interior of the caissons dry) and the work of laying the masonry within the caissons, removing the caissons, and otherwise completing the piers, might have proceeded without intermission. The caissons as altered were filled with water at each tide, and had to be pumped dry after half tide before any masonry could be laid or other permanent work exe-

cuted, and the work had thus to be done intermittently, and at irregular times. This altered manner of executing the work was ordered by the engineer, and executed by the contractors, without objection, in all the piers of the bridge, and the piers were thus finally completed. By reason of the last-mentioned alterations, the contractors were delayed in the execution of the works, and put to considerable additional cost.

The difficulties in carrying out the work in accordance with the plans and designs of the engineer in the several respects before-mentioned were not known by the contractors at the time of entering into the contract, although they might have been discovered on careful examination of the specifications and drawings by a civil engineer of competent skill and knowledge. The contractors had in their employment before and at the time of tendering for the contract a civil engineer, who saw the plans, but no such careful examination had in fact been made by him, or by any other person on behalf of the contractors.

The contractors acted on the assumption of the specification and drawings being fit and sufficient, and of the plan and method of executing the works, as shewn and specified thereby, being fairly and reasonably practicable, and upon that assumption the quantities of the several materials which would be required, and the nature of the work, was calculated and estimated, and the tender was made. It was stated by the plaintiff and the civil engineer in his employment that it was the usage of contractors so to assume and to make their calculations and tenders upon that footing.

The bridge itself as finally built (notwithstanding any alterations in the mode of construction), was the same bridge as that originally designed by the engineer.

The contractors contended that the corporation having invited them to tender upon the specifications and drawings as prepared by their engineer, must be taken to have guaranteed to them that the same were reasonably fit and sufficient for the purposes of the works, and that the works could reasonably and properly be executed in accordance with the same, and that the plan and method of executing the same, as shewn and specified, were fairly and reasonably practicable, and consequently that the corporation

1874

THORN v. MAYOR, &c., OF THE CITY OF LONDON.

were liable for the several faults and defects therein as before mentioned, and for the loss and damage thereby caused to the contractors.

The defendants contended that they were not liable, and that the advertisement, contract, plans, and specification did not shew or contain, nor could there be inferred from them, any such implied warranty on the part of the defendants as was stated and alleged in the declaration, and that the alterations mentioned above, and the additional expenses thereby incurred by the plaintiff, were matters to be dealt with by the engineer of the corporation under the contract.

The question for the opinion of the court was, whether there was any, and (if any) what implied warranty on the part of the defendants to the effect stated in the declaration, or so as to give to the plaintiff a cause of action against the defendants.

If the Court should be of opinion that such warranty existed, and that on the facts the plaintiff had a cause of action, then judgment was to be entered for the plaintiff for forty shillings damages with costs of suit.

If the Court should be of a contrary opinion, then judgment was to be entered for the defendants with costs of suit.

Benjamin, Q.C. (*Littler, Q.C.*, and *J. W. Batten* with him). The plaintiff is 'entitled' to succeed if there is an implied warranty, or any cause of action disclosed on the facts. The work was to be done according to the specified method, and the failure of that was not contemplated by the parties. This damage is neither an extra, nor is it covered by the contract price. It amounts not to a mere addition or alteration, but to a total subversion of the whole original plan, and the substitution of a new one. The specification and contract provide nothing by way of indemnity in such case, the value of the alterations only being contemplated to be paid for as an extra, and this it is conceded has been done. There was an obligation on the contractors to do the work in three years, and it is the act of the defendants in not supplying proper plans that has prevented the plaintiff from doing this, and caused the loss.

[KELLY, C.B. Suppose the contractors had declined to continue

the works when they found the impossibility of carrying them on in this way.]

They might have done so, and sued the defendants, and their right to recover is not affected by continuing the work. The other clauses of the specification which expressly throw liability on the contractors, shew that no further liability on their part was contemplated. If this work was done under the original contract, the plaintiff has been delayed two years in doing it, and for this delay he has not been compensated. If not done under that contract then he has been paid for what he did under the new contract, but has received no compensation for breach of the old one. [He referred to *Roberts* v. *Bury Commissioners.* (1)]

Giffard, Q.C. (*Thesiger, Q.C.*, with him). The only question is whether there is an implied warranty. The contract as to the mode of building, and as to the building itself, cannot be separated. It is quite immaterial who furnished the plans, for the plaintiff has contracted to build the bridge in accordance with them, in a certain time and for so much money. It is he that has broken his contract, and if the work turns out to be impossible, instead of merely, as it is contended is the case here, more difficult, he is still bound by his contract. There is no question here of the defendants' default in supplying anything they ought to supply, or in keeping back anything which was only within their knowledge, and there is nothing that can import into the case the alleged warranty. [He referred to *Scrivener* v. *Pask* (2); *Hills* v. *Sughrue* (3); *Marquis of Bute* v. *Thompson.* (4)]

Benjamin, Q.C., in reply.

KELLY, C.B. This is a case of very great importance to both the parties; but disengaging from the mass of matter before us all that portion which does not belong to the question we have to determine, the case is very simple. The corporation were desirous of entering into a contract for pulling down the old bridge of Blackfriars and substituting a new one. They employed an engineer to prepare plans and specification, which he prepared accordingly,

(1) Law Rep. 4 C. P. 755; in error, Law Rep. 5 C. P. 310.
(2) Law Rep. 1 C. P. 715.
(3) 15 M. & W. 253.
(4) 13 M. & W. 487.

1874

THORN v. MAYOR, &c., OF THE CITY OF LONDON.

together with whatever else was necessary to enable contractors to come forward and make tenders for performing the work. The plaintiff came forward and proposed to execute the works as pointed out in the specification, and with the materials and in the time pointed out, and accordingly the contract was entered into. The work was begun, and the contractor commenced, after pulling down the old bridge, to build the new one. He followed the directions of the specification, by which the foundations of the piers were to be laid by means of iron caissons; the dimensions and materials of which were set out in the specification. After having sunk and completed four tiers of caissons, the water was pumped out, and it was found that the two upper tiers were insufficient to keep out the tidal water, and that in consequence it was necessary to remove them, in which case the building operations could only be continued when the tide permitted. The consequence was, that much more time was necessary to complete the works than would otherwise have been required; and the plaintiff was prevented from entering into other contracts, and in a variety of ways was put to much greater expense than if the work could have been continued and completed in the time described in the specification. On this he insists that the cause of the injury he has received is that the specification was insufficient and delusive, and, in truth, that it was impossible to execute the work in the manner pointed out, and he brings this action, and insists that though nothing of the kind appears on the contract, the defendants impliedly contracted that the work could be carried on in the mode and with the materials specified. The question arises whether, the contract being silent as to any such warranty, we are to presume, nevertheless, that such was the intention of the parties, and that the defendants did impliedly warrant that this work could be executed and completed according to the contract, and in the way and with the materials specified.

No authority has been cited to shew that in a contract of this kind there is any such implied warranty. We must beware how we hold that in contemplation of law people have contracted for something which is not to be found within the written contract to which they have put their hands, or that they must have intended something which they have not declared they intended, and which

one of the parties in this case certainly did not contemplate, namely, that the work contracted for could be performed in the time and mode contained in the specification. There is no authority for so holding, and, looking to principle, it appears to me that we should be making a contract for the parties, and a different one from that into which they have entered, if we implied this warranty. It is said that the engineer was the agent of the corporation, and must be taken to have contracted for and on behalf of the corporation that the specification was sufficient, and that it was reasonably practicable to execute the work in the mode prescribed; but the contract entered into by the plaintiff was absolute and unconditional, that he would execute these particular works for a certain sum and in a certain time.

Supposing it had turned out to be physically impossible to execute these works in the time named, could it be contended that because three years is named, the defendants have undertaken that the work can be executed in that time? It surely is a contractor's business to ascertain whether the work can be done in the time, judging as to that for himself from the mode in which the work is to be done, the materials to be used, and the other matters which he has to consider. How, then, can the corporation be said to have entered into an implied contract that the plaintiff could execute the works in the specified time? If a warranty to this effect had been alleged, the matter would have been hardly arguable, but the question whether the mode specified for doing the work is practicable, stands on precisely the same footing. Looking to the case, we find that the difficulties which prevented the work from being carried out in the manner originally contemplated were not known to the contractors or to the corporation. The latter had no more knowledge or means of determining this question than the former, and they took the advice of a competent person as to the work they desired to do. The other contracting parties might have done the same. It was evidently a case in which it was desirable that they should take the advice of a most competent engineer whether this work could be executed as proposed. How has the plaintiff any right to complain if, instead of arming himself with all the knowledge necessary to enable him to determine whether it was wise and prudent to take

1874

THORN v. MAYOR, &c., OF THE CITY OF LONDON.

the contract, he enters into it without taking any of these steps in the matter? I cannot see that the corporation were bound to do more than they did, or that they incurred any liability on any warranty or promise entered into either by themselves or by their attorney or engineer on their behalf.

It is said, however, that if there be any other ground on which, upon the facts disclosed by the case, the plaintiff is entitled to recover against the defendant, we are at liberty to amend and adapt the record to the case set up. I can, however, see no right in the plaintiff under this contract except to be paid from time to time for the work he has completed, and that has been done. I am of opinion, therefore, that the defendants are entitled to judgment.

PIGOTT, B. I am of the same opinion. Looking at the question stated in the case for our determination, we have to see, first, if there is any warranty that can be implied, and next, whether there is any state of facts on which the plaintiff can recover. The contract has been carried out, and the bridge has been built according to the plans, though not by the method designated; but otherwise the contract is completed by the plaintiff building the bridge and the defendants paying the contract price and extras. This claim comes under neither of those heads, but is a claim for the loss incurred by the plaintiff through the alteration in the method of building, which was found to be necessary through the failure of that first proposed. The corporation are in the ordinary position of a person who employs an engineer or architect to explain what he wants done to another, who, having the plans and specifications before him, tenders for the work. I do not see what more the defendants had to do than to carry out the terms of the contract. I cannot see that they expressly or impliedly warranted that Mr. Cubitt could not or would not fall into error. Mr. Benjamin has pointed out several clauses in the conditions, and has argued that as the corporation in the cases he refers to threw on the contractors an express obligation or liability, they did not do so in other cases. But the clauses he refers to only go to shew that where they could anticipate a difficulty in doing the works they, by express contract, excluded

the liability of the corporation. This only shews that, in those matters which the parties contemplated, and as to which they thought that differences might arise, they provided beforehand, but it does not touch this particular dispute which they did not contemplate. The argument placed before us is, that this work must be taken to have been represented to the contractors as practicable, but I can find no basis or materials from which to draw such an inference.

AMPHLETT, B. I am of the same opinion. The plaintiff, instead of employing on his own account a competent engineer, made his tender on the footing of the plans and specifications of the engineer of the corporation, who was known to him as an engineer of eminence and reputation. The contractor chose to rely on his well-known ability. If there had been any case set up of an attempt to impose on the contractors, this matter would have assumed a different aspect; but nothing of this kind is suggested. The question which underlies the whole matter is whether the corporation impliedly contracted that the plans were such as to make the work reasonably practicable. To say that a contractor who has chosen to rely on the name and reputation of the person employed by the other party, when he finds that he should not have done so, can make the principal liable, is going far beyond any case that has been cited. I can see no implied warranty such as is contended for. I have great doubts whether this alteration which actually took place comes within the powers of variation contained in the contract; but the contractor did not raise this objection, but, as found by the case, proceeded with the works in the new mode specified by the engineer. He seems to me to have sanctioned the act of the engineer in making the alteration, and it is now too late for him to say it is a matter *dehors* the contract, and to require an indemnity for the extra expense he has been put to. This is, however, a minor point; the principal matter is that in the contract I cannot find the implied warranty which the plaintiff endeavours to set up.

Judgment for the defendants.

Attorney for plaintiff: *J. B. Batten.*
Attorney for defendants: *F. Brand.*

1874
May 8.

CHILD *v.* HEARN.

Duty to fence—Straying Animals—Railway—Negligence—Railway Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *s.* 68—"*Cattle.*"

10 Q.B.D. 515

The plaintiff, a platelayer in the employment of a railway company, was returning from his work along their line upon a trolly propelled by hand, when the defendant's pigs got through the fence of his field, which adjoined the railway, on to the line in front of the trolly; the trolly ran over the pigs and was upset, and the plaintiff was injured.

The defendant was owner of the adjoining land; the fence erected by the company under 8 Vict. c. 20, s. 68, was sufficient against horses, oxen, and sheep; but there was enough space between the lowest rail of the fence and the ground for pigs to crawl through, and the defendant's pigs had in fact (as the jury found) crawled under the fence. There was evidence to shew that the defendant had been warned on a former occasion of his pigs being on the line, but there was no evidence to shew how the pigs got from defendant's farm yard, where they were last seen, into the field adjoining the railway. In an action against the defendant for the injury sustained by the plaintiff:—

Held, first, that the word "cattle" in 8 Vict. c. 20, s. 68, included pigs, and that the fence was, therefore, insufficient.

Secondly, that, assuming there was negligence in the defendant, the plaintiff could not recover, for that he was identified with the company whose line he was using for their purposes, and through whose neglect to erect and maintain a sufficient fence the accident was caused.

ACTION brought to recover damages for personal injuries caused to the plaintiff by the defendant's negligence. (1)

(1) Declaration: first count: that the plaintiff was a servant of the Great Eastern Railway Company, and was lawfully travelling on the railway of the said company, on a truck or trolly; that defendant was possessed and in the occupation of a close of land near the railway, and by reason thereof ought of right to have kept his close fenced so as to prevent his cattle and other animals from escaping thereout on to the railway, and causing damage to persons lawfully on the railway. Yet the defendant did not keep fenced his close as aforesaid, whereby divers cattle or other animals, to wit, pigs, of the defendant's escaped out of the close on to the railway, and ran against the said truck or trolly, whereby it was upset and thrown off the line, and the plaintiff was thrown out and injured, &c.

Second count: that the defendant so negligently kept and managed certain pigs of the defendant's, that they ran against a truck on which the plaintiff was riding, whereby the truck was upset, and the plaintiff thereby injured, &c.

Pleas: 1, not guilty. 2, to the first count, that plaintiff was not lawfully travelling on the said railway as alleged. 3, to the same, that it was not any part of defendant's duty, nor ought he of right, to have kept the said close fenced as, or for the purposes alleged.

Issue.

On the trial of the cause before Bramwell, B., at Westminster, in Hilary Term, 1874, it appeared that on the 12th of July, 1873, the plaintiff, who was a platelayer in the service of the Great Eastern Railway Company, was returning from his work upon their line, in company with his fellow workmen, and with tools and materials, upon a trolly worked by hand, when some pigs of the defendant broke from a potato bed by the side of the line and within the railway fence, and ran over the line. The trolly passing over two of the pigs was upset, and the plaintiff's leg was broken.

The defendant was occupier of the land on both sides of the railway, which was severed land, and which the railway company were (by 8 Vict. c. 20, s. 68 (1)) under an obligation to fence. There was a fence consisting of posts and rails with quickset, which the jury found to be a sufficient fence against horses, oxen, and sheep; but there was a space of thirteen inches between the lowest rail and the ground, through which the pigs (which were described as 25s. pigs) might have crept, and the quickset was not grown enough to keep them out. The jury found as a fact that the pigs crawled under the fence. Some evidence was also given of the defendant having been warned on some previous occasion of his pigs being on the line, but there was no finding by the jury as to this; nor was there any evidence to shew how, on the present occasion, the pigs, which had been last seen in the defendant's yard, had got into the field adjoining the line, or thence on to the line.

The learned judge ruled that pigs were not included in the term "cattle" in 8 Vict. c. 20, s. 68; that the defendant was bound to keep his pigs within bounds; and that, treating the railway as a highway, he was answerable for the consequences of

(1) 8 Vict. c. 20, enacts as follows: "And with respect to works for the accommodation of lands adjoining the railway, be it enacted as follows:

"Sect. 68. The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say, ... Sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining land not so taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway."

1874

CHILD v. HEARN.

their trespassing to any one lawfully using it. A verdict was entered for the plaintiff for 100*l.*, the amount assessed by the jury, the learned judge reserving leave to the defendant to move to enter a nonsuit or a verdict for him, on the ground that there was no evidence to go to the jury of liability on the part of the defendant, or that, on the findings of the jury, the verdict ought to have been entered for him.

A rule was obtained accordingly, and also for a new trial on the ground of misdirection in the learned judge in telling the jury that the defendant was bound to keep the pigs from straying on the line, and was liable to the plaintiff for damage sustained by him in consequence of the pigs so straying, without proof of the circumstances under which the pigs so strayed, and that 8 Vict. c. 20, s. 68, did not include pigs under the term "cattle."

Bray (*Morgan Howard* with him) shewed cause. First, it was not necessary that the plaintiff should shew any negligence in the defendant, for the defendant was bound to keep the pigs within his own boundary, and was liable for any damage done by them if they escaped. The law is so laid down by Williams, J., in *Cox* v. *Burbidge* (1): "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial." This was cited with approval, and acted upon, in *Fletcher* v. *Rylands*. (2) In *Cox* v. *Burbidge* (3) it was held that the defendant was not liable on the ground that the cause of action was an injury inflicted through the vice of the defendant's horse, and that there was no evidence of the scienter: *May* v. *Burdett* (4) having laid down that in such cases it is the keeping of a mischievous animal with knowledge of

(1) 13 C. B. (N.S.) at p. 438; 32 L. J. (C.P.) 89, at p. 91. 9 Jur. N.S. 971

(2) Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330. 12 Jur. N.S. 603.

(3) 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89. 9 Jur. N.S. 970

(4) 9 Q. B. 101; 16 L. J. (Q.B.) 64.

its mischievous qualities, that constitutes the negligence, which, coupled with the consequent injury, gives the cause of action: see also *Read* v. *Edwards*. (1) In *Lee* v. *Riley* (2), however, it is laid down that where the animal trespasses, it is immaterial that the injury done was due to his vice.

[BRAMWELL, B. What was said there qualifies *Cox* v. *Burbidge* (3) to this extent, that where the animal is a trespasser on the plaintiff's land so that damages must be recovered, the fact that an injury done by it was due to the animal's vice, may be immaterial with reference to the liability of the owner to damages; but the pigs were not trespassers as against the plaintiff; the injury done to him was the only thing that gave him a cause of action.]

If not trespassers as against the plaintiff in the sense that they were on his land, they were at least wrongfully upon the railway as against him in this sense, that he was lawfully using the line, which is a public highway, and they were wrongfully there obstructing his use of it, and thereby causing the damage complained of. But however it might be if this were a case of vice, that difficulty does not occur here, because this injury was not due to any vice in the animals, but only to the propensity to stray, which is common to all animals, and which the defendant was bound to guard against. Secondly, there was evidence of negligence in the defendant, for he had been warned before of his pigs being on the line; and, moreover, the fence was evidently insufficient against pigs of this size. Thirdly, the injury complained of was the natural result of the pigs straying, and, whether on the ground of the defendant's failure in his duty to keep the pigs in, or on the ground of special evidence of negligence, the defendant is liable for the consequences. If negligence is once established, it is no answer that it did much more damage than was expected: *Smith* v. *London and South-Western Ry. Co.* (4); *Bailiffs of Romney Marsh* v. *Trinity House* (5); *Sneesby* v. *Lancashire and Yorkshire Ry. Co.* (6) Nor is it any defence

(1) 17 C. B. (N.S.) 245; 34 L. J. (C.P.) 31.

(2) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.

(3) 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89.

(4) Law Rep. 6 C. P. 14.

(5) Law Rep. 5 Ex. 204.

(6) Law Rep. 9 Q. B. 263.

1874

CHILD v. HEARN.

to say that the negligence of the railway company (assuming them bound to fence) contributed to the injury: *Hill* v. *New River Company*. (1) Neither, in any view, was there any negligence on the part of the company with respect to the plaintiff, for the obligation to fence, imposed by 8 Vict. c. 20, s. 68, exists only in favour of the owners and occupiers of the adjoining land, and is equivalent to a common law prescriptive obligation to fence: *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Wallis* (2); *Ricketts* v. *East and West India Docks, &c., Ry. Co.* (3); *Fawcett* v. *York and North Midland Ry. Co.* (4); *Bessant* v. *Great Western Ry. Co.* (5); there is no such obligation imposed on them as towards their passengers, still less as towards their own servants: *Buxton* v. *North-Eastern Ry. Co.* (6) Nor could the plaintiff be identified with the alleged negligence of the railway company; the authority of the case of *Thorogood* v. *Bryan* (7) has been much shaken by *Tuff* v. *Warman* (8), *The Milan* (9), and other cases: see Smith's Leading Cases, vol. i. p. 266, 6th ed.; and the true rule is that laid down in Shearman and Redfield on Negligence, p. 48, § 46: "Where the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plaintiff's control, or that he controlled the plaintiff's personal conduct." (10)

[POLLOCK, B. Is it not like the case of a man riding in a friend's carriage, which is so rotten that it is broken to pieces by what would do an ordinary carriage no harm? Would he not take on himself the risk of the condition of the carriage?]

(1) 9 B. & S. 303.

(2) 14 C. B. 213; 23 L. J. (C.P.) 85.

(3) 12 C. B. 160; 21 L. J. (C.P.) 201.

(4) 16 Q. B. 610; 20 L. J. (Q.B.) 222.

(5) 8 C. B. (N.S.) 368.

(6) Law Rep. 3 Q. B. 549.

(7) 8 C. B. 115.

(8) 2 C. B. (N.S.) 740; 26 L. J. (C.P.) 263.

(9) Lush. 388; 31 L. J. (Adm.) 105.

(10) The case cited in support of this proposition is *Eaton* v. *Boston and Lowell Railway Company* (11 Allen R. 500), which was an action brought by a passenger against the carriers in respect of an accident caused by the joint negligence of the defendants and another company using their line under running powers. The defendants in effect asked the judge to rule that the concurrence of the negligence of others in causing the accident prevented the plaintiff from recovering against them, and the refusal of the judge so to rule was upheld by the Court

There seems no more reason why he should take the risk of an ill-constructed carriage than of a negligent driver. But, lastly, the railway company was guilty of no negligence; for pigs are not included in the term "cattle" in 8 Vict. c. 20, s. 68. It must be admitted that they are within the definition of cattle as given in the dictionaries of Webster and Richardson (1), but they are not commonly spoken of as cattle; they are not domesticated to the same degree as the creatures which are commonly called cattle; nor are they so frequently fed in fields; and it is therefore unlikely that they were meant to be included.

Lanyon (*Thesiger, Q.C.*, with him), for the defendant, was not called on.

BRAMWELL, B. I am of opinion that this rule must be made absolute. By s. 68 of the Railways Clauses Consolidation Act, 1845, the railway company is bound to make a sufficient fence for the protection of the adjoining landowner. [The learned judge read the section, and proceeded:—] The fence is to be sufficient for two purposes, for separating the land taken for the use of the railway from the adjoining lands not taken, and for "protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway." The company were therefore bound to fence against the defendant's cattle, and I think the word "cattle" in this section is sufficiently comprehensive to include pigs. Now the fence was not sufficient to prevent the defendant's pigs from trespassing, and it would seem to follow that the railway company must be liable for the consequence of the pigs escaping through it. But it does not follow as a consequence that they would be liable for any mischief done by any pig escaping on to the line through a defective fence. Nor do we lay down that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock

(1) These definitions are as follows:—Webster: "Cattle—beasts or quadrupeds in general, serving for tillage, or other labor, and for food to man," and the word is said to include "perhaps swine." Richardson: "Cattle—kine, horses, and some other animals appropriated to the use of man;" and the following lines are quoted from Ben Jonson:—

> "Th' ignoble never lived, they were awhile,
> Like swine or other cattell, here on earth."

1874

CHILD v. HEARN.

could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it. Now here the pigs had crawled underneath the fence before, and the owner of the adjoining field had been warned of it. It is plain, therefore, that the fence was not sufficient, and in my judgment the company could clearly not have maintained any action against the owner of the pigs for trespass, and probably he might have maintained an action against them for any injury to the pigs through their getting on the line. At any rate, without saying how this might be, the fence was not sufficient.

The pigs then got upon the line through an insufficient fence, and caused injury to the plaintiff, and the question arises, is the defendant liable? What might happen if one of the public were injured in the use of the railway, which is a public highway, I will not say. The defendant might perhaps say, "I was not bound to fence;" but then the plaintiff might reply, "There was an opening through which you knew the pigs might get out of your field upon the line; you allowed them to be in the field, and I, using the road innocently, suffered injury through their escaping on to the line." But however that might be, here the plaintiff was a servant of the owner of property which was unfenced through the owner's default. It is manifest, as I have before said, that if the pigs got on to that unfenced property through its owner's default, the owner could not maintain an action; and, if so, it is impossible to say that a third person, using the property through the licence of the owner, and on his behalf, can. The servant can be in no better position than the master, when he is using the master's property for the master's purposes. Therefore, without saying anything as to the decision in *Thorogood* v. *Bryan* (1) it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employer, and that, having met with the accident through his employer's negligence, the plaintiff can maintain no action against the defendant.

(1) 8 C. B. 115.

PIGOTT, B. I am of the same opinion. The Railways Clauses Act, 1845, s. 68, commences with the words "the company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway;" the railway company then are to do the things mentioned, instead of the owners and occupiers. Then what are those things? They are to make and maintain "sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway." Now, one need only consider the state of things produced by the making of a railway through an estate, to see how reasonable it is that the owner, who is compelled to part with a portion of his land to the railway, should be relieved of the new and unlimited responsibility which would be otherwise cast on him of keeping in his cattle against the railway company and the passengers by their line. The reason of the thing certainly applies as much to swine as to other animals; but it is said the word "cattle" used in the Act does not include them. Certainly, however, they are such animals as are commonly to be found kept like other cattle in the fields, in some parts of the country almost as commonly as sheep, in other places at particular seasons of the year. I see no reason for excluding them from the provision, and I think the word is wide enough to include them. I agree that the company are not bound to fence against animals of extraordinary capacities or under unusual conditions; but they must have a fence sufficient against ordinary cattle. Now here, the finding is, in effect, that the fence was sufficient against other cattle, but not against swine. It was therefore not a sufficient fence within the meaning of the Act. The defendant then, it not being shewn that he has been guilty of any negligence, is not responsible to the plaintiff for the accident which has occurred.

POLLOCK, B. I am of the same opinion. It is unnecessary to discuss *Fletcher* v. *Rylands* (1), or *Hill* v. *New River Company* (2), where it was held that the defendants were liable because the

(1) Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330. (2) 9 B. & S. 303.

12 Jur N S 603.

1874

CHILD v. HEARN.

proximate cause of the injury was brought about by their negligence, and that they could not better their position by saying that the result would not have been so mischievous if the negligence of another person had not concurred to cause it; because here it is clear the injury to the plaintiff was caused by the want of a sufficient fence. It is clear also, as my brother Bramwell has said, that the railway company could not have maintained any action against the defendant in respect of trespass by the defendant's pigs. But it is contended that nevertheless the plaintiff can, and that he ought not to be considered as identified with the company. If the case were within the passage cited from Shearman and Redfield this might be open to doubt, but that passage has no application to the present case, where the plaintiff met with his injury through being upon premises originally insufficiently protected by those in whose employment he was. This takes it out of the proposition laid down in the passage cited, and makes the case resemble the one I put during the argument, of a person riding in another person's carriage, which is so rotten that a blow by some passing vehicle, which would have no such effect if the carriage were sound, breaks it in pieces. I think, that in such a case, the person riding in the carriage would be identified with the carriage in which he was riding. So here, the plaintiff is identified with the land which he was using for his own convenience; and that as the defective condition of that land, which was due to the owner's neglect, was the cause of the accident, the plaintiff cannot sue the defendant for the injury.

Rule absolute.

Attorney for plaintiff: *Christmas.*

Attorney for defendant: *Bromley, for Veley & Cunnington, Braintree.*

[IN THE EXCHEQUER CHAMBER.]

1874
May 14.

DANIEL AND ANOTHER *v.* STEPNEY AND ANOTHER.

Landlord and Tenant—Rent-charge—Distress upon Lands not included in the Demise—Mines—Notice.

Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall for the time being be in course of working by the lessees, their executors, administrators, and assigns." The plaintiffs, being assignees of the lease with notice, under a trust deed made by the lessees for the benefit of creditors, sued the defendants for a distress made under the above-mentioned power, after the assignment, at pits not included in the demise, but referred to in it, and then worked by the lessees :—

Held, that, whether the power was or was not a valid power of distress against strangers, the plaintiffs, taking as assignees with notice, were bound by it.

ERROR on the judgment of the Court of Exchequer in favour of the plaintiff on a demurrer to the defendants' plea.

After the judgment below was pronounced, as reported (1), the plea was amended, and (the parties intending to carry the case to the Exchequer Chamber) judgment was given without argument for the plaintiffs on a demurrer to the amended plea.

The case was argued in the Exchequer Chamber in the sittings after Hilary Term, 1873, and the case stood over for the defendants to apply at Chambers for leave to make certain suggested amendments. Leave to make these amendments was refused, and the case was re-argued.

The pleadings as they now stood were as follows :—

Declaration : 1st count, for entering plaintiffs' lands and taking and carrying away fixtures and goods of the plaintiffs, and disposing of the same to defendants' use.

2nd count, trespass de bonis asportatis.

Plea, on equitable grounds, that the lands mentioned in the first count of the declaration were the lands called "Carnarvon" in the lease thereinafter set forth ; that at the time of the alleged

(1) Law Rep. 7 Ex. 327, where the pleadings, as they then stood, are set out.

1874

DANIEL v. STEPNEY.

trespasses there were in the said lands, pits communicating with mines lying under certain lands of the defendant Stepney (called in the said lease the "described lands") and adjoining the lands in which, &c.; that at the time of granting the said lease Thomas Harries and others were possessed of the lands in which, &c., and of the mines and collieries under the same, for a term still unexpired, and were desirous of extending the workings and mines from those lands to the coal and culm under the said land of Stepney, adjoining the lands in which, &c., and more particularly described in the said lease, and Stepney, before the alleged trespasses, by deed leased the last-mentioned coal and culm to the said Thomas Harries, &c.

The plea then set out the lease, alleging it to be executed by the lessees, by which the defendant Stepney demised to Thomas Harries and others, for a term of forty years, the coal and culm under certain lands thereinafter referred to as "the said described lands," with liberty to dig pits for winning and working the same, and also with liberty to bring minerals and substances underground from any workings for the time being in their occupation under adjoining or neighbouring lands, for the purpose of bringing the same to bank on the "described lands," with certain surface rights accessory thereto; and also with liberty to win and work the demised coal by means of workings under the adjoining lands called "Carnarvon," then in the occupation of the lessees, and the pits sunk, or to be sunk, on such adjoining lands; paying a surface rent for land used, and a sleeping rent and royalty in respect of the coal and culm, and a way-leave for coal got under other lands and brought to bank on the "described lands;" with a covenant by the lessees to indemnify the lessor against any claims (if any should or could be made) by persons interested in any adjoining or neighbouring lands by reason of acts or omissions of the lessees in respect of getting, laying, or disposing of the demised minerals in or upon such lands; and with a proviso that if any of the reserved rents, royalties, or way-leaves should be unpaid for twenty-one days after they should become due, the reversioner or reversioners might stop and hinder the loading and sending of any coal, culm, materials, or things from off the said premises, including as well the said "described lands,"

as also any lands other than the described lands in which there should for the time being be any pits or openings by or through which the coal and culm thereby demised, or any part thereof, should for the time being be in course of working by the lessees, their executors, administrators, or assigns, and for that purpose, and for the purpose of distraining, as thereinafter mentioned, to enter into such other lands as well as the said described lands, and also to distrain all and every or any of the coal, culm, or materials, and also the horses, gins, &c., live and dead stock, materials, goods, chattels, and effects, standing and being, or used or employed in, upon, under, about, or in connection with, or as accessory to the coal and culm thereby demised, or any part or parts thereof, or in or upon any railway or tramway connected with any of the premises, and the distress and distresses then and there found to take, lead, and carry away, and to sell and dispose of the same, and generally to demand, in like manner as in cases of distress for rent reserved in common leases for years, and thereout to satisfy the arrears and costs.

The plea then stated that the lands described in the lease as "lands other than the described lands" referred to the lands in which, &c., and in which the said Thomas Harries and others, at the time of the demise, and the plaintiffs at the time of the alleged trespasses, had pits through which the said demised coal and culm could be most advantageously and easily worked; that certain of the rents, royalties, and way-leaves became in arrear for twenty-one days, and whilst they were unpaid, and before the alleged trespasses, the lessees assigned their interest in the lease, and in the lands in which, &c., to the plaintiffs in trust for the benefit of creditors.

The plea then set out the deed (which conveyed and assigned the whole property of the debtors), and proceeded to state that, save under the said deed, the plaintiffs never had any interest in or possession of the lands in which, &c., or the goods thereinafter mentioned; that at the time of making the said deed the plaintiffs had notice and knowledge of the said lease, and of the covenants, provisions, and terms therein contained; that whilst the plaintiffs were such trustees as aforesaid, and possessed as aforesaid, and because the said rent was still due and unpaid, and

1874

DANIEL v. STEPNEY.

in exercise of the rights granted by the said Thomas Harries and others as aforesaid, the defendant Stepney in his own right, and the defendant Rosser, as the servant and bailiff of Stepney, entered the lands in which, &c., the same being lands then used in connection with or as accessory to the said demised coal and culm, being parcel of the said adjoining lands called Carnarvon, and being the lands other than the said described lands referred to in the lease, and then being in all respects lands liable to the distress thereinafter mentioned, for the purpose of distraining for the said rent so due, and did then distrain therefor certain coal-waggons, carts, and other chattels and distrainable things, the same being then in the possession of the plaintiffs by virtue of, and which vested in them under and by virtue of the said assignment, and standing and being, or used and employed, in connection with the said works, in or upon the said lands in which, &c., doing no more than was necessary in that behalf, which are the alleged trespasses, &c., in the declaration mentioned.

Demurrer and joinder.

Joshua Williams, Q.C. (*Giffard, Q.C.*, *Herschell, Q.C.*, and *Trevelyan* with him), for the defendants, contended that the power of distress contained in the lease was valid at common law; and cited Co. Litt. 147 a.; *Butt's Case* (1); Bacon's Maxims, Comments on Reg. 14; Fearne, p. 528; Jarman's Bythewood, vol. iv., p. 162; *Locke* v. *Darley* (2); *Allerson* v. *Eden* (3); *Corbet's Case* (4); *Allen* v. *Givers* (5); *Casamajor* v. *Strode* (6); but that if not valid so as to affect third persons whose goods might be seized under it, it was valid in equity as against the plaintiffs, who took as assignees with notice, citing *Staines* v. *Morris* (7); *Tulk* v. *Moxhay* (8); *Parker* v. *Whyte* (9); *Clements* v. *Welles* (10); Sugd. Vendors and Purchasers, 14th ed., app. 1, p. 799.

The Court then called on

Manisty, Q.C. (*Murphy, Q.C.*, and *Beresford* with him), for the

(1) 7 Co. Rep. 23.
(2) 2 Dr. & W. 256.
(3) Noy, 5.
(4) 1 Co. Rep. 83 b.; at p. 87.
(5) Moor, 179, 185.
(6) 2 Sw. 347, at p. 357.
(7) 1 V. & B. 8.
(8) 2 Ph. 774.
(9) 1 H. & M. 167; 32 L. J. (Ch.) 520.
(10) Law Rep. 1 Eq. 200.

plaintiffs, who, without arguing the first point, referred to *McLean* v. *McKay* (1), and admitted that on the second point he could not maintain the plaintiffs' contention.

PER CURIAM (Cockburn, C.J., Blackburn, Keating, Mellor, Lush, and Denman, JJ.). We had all arrived at the conclusion that the judgment below must be reversed.

Judgment reversed.

Attorney for plaintiffs: *Hacon.*
Attorney for defendants: *Calcott.*

(1) Law Rep. 5 P. C. 327.

END OF EASTER TERM, 1874.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXXVII VICTORIA.

1874
June 1.

WOOD *v.* WOAD AND OTHERS.

Mutual Insurance Society—Partnership—Wrongful Expulsion.

10 Ch D 846
4 Ch D 471-478, 480

Declaration, alleging that the plaintiff was a member of a mutual insurance society, which insured members against losses to ships entered and insured in the books of the society, on a deposit being made of 5*l.* per cent. on the amount insured; that the defendants were the committee of the society, by the rules of which they had the entire control of the funds and affairs of the society, and were to determine on the admission or rejection of ships insured or proposed for insurance; that by another rule, "if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member, by directing the secretary to give such member notice in writing that the committee have excluded such member from the society, and, after the giving of such notice, such member shall be excluded, and have no claim or be responsible for or in respect of any loss or damage happening after such notice;" that the plaintiff, as such member, had entered a ship on the books of the society, and had paid the deposit, and was thereupon entitled to an indemnity for loss happening to the ship; that the defendants, well knowing the premises, but "wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity, did wrongfully, collusively, and improperly expel the plaintiff from the society on the alleged ground that his conduct was suspicious, or that he was for some reason unworthy of remaining in the society, without giving the plaintiff, or any person on his behalf, any opportunity whatsoever of being heard before them,

1874

WOOD v. WOAD.

and without, in fact, hearing the plaintiff, or any person on his behalf, in defence and vindication of the plaintiff's conduct as a member of the society with reference to the said ground of expulsion"; whereby the plaintiff lost the benefit of an indemnity for damage which his ship subsequently sustained, and was otherwise damnified. Demurrer:—

Held, that the declaration shewed no cause of action.

By Kelly, C.B., Pollock and Amphlett, BB. (following *Blisset* v. *Daniel*, 10 Hare, 493), on the ground that, assuming the allegations of the declaration to be true, the act of the defendants in expelling the plaintiff without giving him an opportunity of being heard was void; that the plaintiff, therefore, still remained a member of the society, and had sustained no damage.

By Cleasby and Pollock, BB., on the ground that the declaration did not sufficiently charge mala fides.

Quære, by Cleasby and Amphlett, BB., whether any action would lie against the defendants for acts done by them in the discharge of their functions as members of the committee.

DECLARATION, that the plaintiff was a member of a mutual marine insurance association or club, called the Goole Marine Insurance Society, which had been formed and was carried on for the purpose of mutually insuring and indemnifying the members against losses and damages by the perils of the seas, rivers, navigations, and waters, enemies, pirates, jettisons other than that occurring to deck cargo, and fires happening to or done by their respective vessels and parts of vessels entered or insured respectively by them in the books of the society, on deposit with the treasurer of a sum equal to 5*l.* per cent. on the amount of the sums for which such vessels should be insured, and on the terms contained in the rules of the said society; that the plaintiff, as such member, and having deposited with the treasurer such sum as aforesaid, had a certain ship or ships duly entered in the books of the society, upon and in accordance with the terms aforesaid.

That the defendants were the committee of the society, and that one of the rules of the society was as follows, viz. "That the management of the affairs of this society shall be at all times hereafter conducted by a committee of not less than nine persons (either members of the society or not), one of whom shall be appointed president of the society; that such committee shall have the entire control of the funds, affairs, and concerns of the society; and shall determine upon the admission, rejection, and exclusion of any vessel insured or proposed to be insured by it, and such determination shall be entered by the secre-

1874

WOOD v. WOAD.

tary in the books of the society, and be final and binding upon all parties unless where they afterwards see cause to alter and do alter the same; provided that no member of the committee shall act as such in the settlement of his own loss. That the ordinary meetings of the committee shall be held in the first week of every month at Goole, on such day and hour as the president for the time being shall determine. That a majority of the committee present at any meeting shall have full power to act, provided that such majority do not consist of less than three in number."

That another rule of the society was as follows, viz. "that if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member by directing the secretary to give such member notice in writing that the committee have excluded such member from the society, and after the giving of such notice such member shall be excluded, and have no claim or be responsible for or in respect of any loss or damage happening after such notice."

That the plaintiff, as such member as aforesaid, and having deposited with the treasurer of the society such sum as aforesaid, and having his ship or ships entered on the books of the society as aforesaid, was under and in accordance with the rules of the said society entitled to receive, and but for the grievances hereinafter mentioned would have received, from the funds of the society an indemnity for any loss or damage happening to his said ship or ships so entered as aforesaid, by the perils of the seas, &c., during his membership.

Yet the defendants, well knowing the premises, but wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity as aforesaid, did wrongfully, collusively, and improperly expel the plaintiff from the said society on the alleged ground that his conduct was suspicious, or that he was for some reason unworthy of remaining in the society, without any just, reasonable, or probable cause whatsoever for such expulsion; and without having given the plaintiff any notice that his conduct was to be investigated and adjudicated upon by the said

committee, and without giving the plaintiff, or any person or persons on his behalf, any opportunity whatsoever of being heard before them, and without, in fact, hearing the plaintiff, or any person or persons on his behalf, in defence and vindication of the plaintiff's conduct as a member of the said society with reference to the said ground of expulsion.

That before and at the time of his said expulsion from the society, the plaintiff had a certain ship called the *Progress* duly entered in the books of the society, and had deposited with the treasurer of the society such sum as aforesaid, and the said ship sustained certain damage by the perils of the seas a few days after the said expulsion of the plaintiff from the society, and but for the said expulsion he would have been entitled to receive and would have received 92*l.* 2*s.* 8*d.* from the funds of the society as an indemnity for the said damage so sustained as aforesaid, and that by reason of his said expulsion he has lost the said sum of 92*l.* 2*s.* 8*d.*, and has been otherwise, by reason of the said wrong of the defendants, greatly damnified and injured.

Demurrer and joinder.

The defendants also pleaded pleas raising issues of fact. On the cause coming on for trial before Pollock, B., at the Leeds Spring Assizes, 1874, the learned judge nonsuited the plaintiff, on the ground that the facts stated in the declaration shewed no cause of action.

A rule was afterwards obtained to set aside the nonsuit and for a new trial. This rule raised the same points as the demurrer, and judgment on the rule stood over till after argument of the demurrer.

Waddy, Q.C. (*S. Tennant* with him), in support of the demurrer. First, the committee had an absolute and unappealable power of expulsion; a discretionary power had been reposed in them by the partners, including the plaintiff himself, of an extreme kind, it must be admitted, but one necessary for the conduct of the co-partnership business; and to hold that they could be sued in respect of the manner in which they exercised their functions would practically destroy the benefits for the sake of which the power was conferred. In effect this is an action between partners

1874

WOOD v. WOAD.

which a court of common law will not entertain. Secondly, the plaintiff has suffered no damage. The damage alleged is that the plaintiff, in consequence of his expulsion by the defendants, lost the compensation which he would have recovered in respect of injuries sustained by his ship *Progress*. But he could have maintained no claim in respect of these injuries unless a policy had been executed: *Smith's Case* (1); *Fisher* v. *Liverpool Marine Insurance Co.* (2); and it is nowhere alleged in the declaration that any such policy had been executed.

[KELLY, C.B. The declaration alleges that the plaintiff paid a sum of money for the privileges of membership, and that he was improperly expelled, and alleges general damage.]

Assuming that such damage would be sufficient to support the action if the declaration shewed a fraudulent exercise of their power by the committee, the allegations fall short of this. No word is used implying fraud; the word "collusively" is insufficient.

[AMPHLETT, B. Apart from the word "collusively," if the allegations in the declaration are true, it would appear that the attempted expulsion of the plaintiff was invalid, no opportunity having been afforded him for explanation: *Blisset* v. *Daniel* (3); if so the plaintiff is still a member, and he has suffered no damage.]

Digby Seymour, Q.C., (*Lewers* with him), contrà. The word "collusively" imports fraud: *Batterbury* v. *Vyse*. (4)

[AMPHLETT, B., referred to *Gill* v. *Continental Union Gas Co.* (5)]

Even if by itself the word does not import fraud, there is sufficient in the context to give it that meaning. Admitting that the committee have a discretionary power, their discretion must be exercised honestly, and if by a fraudulent use of their power the plaintiff is injured, the action lies. Actual specific damage is sufficiently alleged, for it must be assumed that whatever was legally necessary to entitle the plaintiff to make a valid claim for compensation for his loss had been done. But, apart from

(1) Law Rep. 4 Ch. 611.
(2) Law Rep. 8 Q. B. 469; affirmed, Law Rep. 9 Q. B. 418.
(3) 10 Hare, 493.
(4) 2 H. & C. 42; 32 L. J. (Ex.) 177.
(5) Law Rep. 7 Ex. 332, at p. 337.

(4) S.C. 9 Jur. N.S. 764

this, the unjustifiable and improper expulsion of the plaintiff from the society is in itself legal damage; and that the expulsion was improper is shewn by the admitted fact, that no opportunity was given to the plaintiff to be heard in his defence: *Rex* v. *Cambridge University* (*Dr. Bentley's Case*) (1); *Rooke's Case* (2); *Ex parte Ramshay.* (3)

[CLEASBY, B., referred to *Reg.* v. *Archbishop of Canterbury* (4) and *In re Hammersmith Rent Charge.* (5)]

[POLLOCK, B. How do you meet the difficulty, that if the allegations in the declaration are true, the attempted expulsion was void, and the plaintiff's position was unaltered?]

The attempt itself was injurious; it would entail on the plaintiff the necessity of filing a bill in Chancery to restore him to the enjoyment of his rights: *Dixon* v. *Fawcus.* (6)

[KELLY, C.B., referred to *Beaurain* v. *Scott.* (7)]

Tennant, in reply.

KELLY, C.B. [after stating the declaration, proceeded]. The question is whether this count can be sustained, and I am of opinion that it cannot. But I do not proceed on the ground that the committee are in any way justified in what they did. The allegation is that the plaintiff was expelled without any opportunity being given him of being heard in his defence or of shewing that there was no ground of suspicion against him, nor anything which would make him unworthy of remaining a member. I am of opinion that before the committee could be justified in giving him notice of expulsion they were bound to give him this opportunity, and if the case rested there, and but for the considerations to which I am about to refer, I think the plaintiff would be entitled to maintain his action. But when we look at the nature of the act of expulsion, it is plain that its effect, if it had any, was to cause the plaintiff to cease to be a member of the co-partnership, and to deprive him of any rights, privileges, and benefits which he would have been entitled to under its rules. Now whether it has that

(1) 1 Str. 557.
(2) 5 Co. 99, 100.
(3) 18 Q. B. 173, at p. 190; 21 L. J. (Q.B.) 238.
(4) 1 E. & E. 545; 28 L. J. (Q.B.) 154.
(5) 4 Ex. 87; 19 L. J. (Ex.) 66.
(6) 3 E. & E. 537; 30 L. J. (Q.B.) 137.
(7) 3 Camp. 388.

1874

WOOD v. WOAD.

effect depends altogether upon whether by the so-called expulsion he ceased to be a member, and the contention of the defendants is that, if (as the plaintiff alleges) the act of expulsion was unjustifiable and unlawful for the reasons already mentioned, it was void, the plaintiff did not cease to be a partner, but is still entitled to enforce the rights of a partner against the association, notwithstanding the act by which it has been sought to deprive him of them.

This, then, is the great question in the case: was the alleged act of expulsion void? It is contended for the plaintiff that the language of the rules gives an unconditional and absolute power to the committee to expel a member from the society, and I agree that if the committee in fact exercised their power under the rules, their decision could not be questioned; however unfounded the reasons for it may have been, it would have been final and could not be reviewed by any Court. But they are bound in the exercise of their functions by the rule expressed in the maxim audi alteram partem, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals. In the case of *In re Hammersmith Rent Charge* (1), Parke, B., though in that particular instance he dissented from the judgment of the majority, laid down principles which were not questioned, "It has long been a received rule in the administration of justice, that no one is to be punished in any judicial proceeding unless he has had an opportunity of being heard." After referring to several circumstances the learned judge goes on: "In *Capel* v. *Child* (2) Bayley, B., says that he knows of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard," and then, after referring to the details of the case of *Capel* v. *Child*, he adds, "This is an extremely strong case, and shows how powerful the principle of justice is in all judicial pro-

14 Ch D 478

(1) 4 Ex. 87, at p. 97. (2) 2 C. & J. 558, at p. 579.

ceedings: Qui statuit aliquid parte inauditâ alterâ, Æquum licet statuerit, haud æquus fuit." (1) I entirely adopt this language and I apply it to the present case.

I come next to the case of *Blisset* v. *Daniel* (2), referred to by my brother Amphlett, which is almost identical with the case before us. The marginal note to that case states as follows: "Articles of partnership provided that it should be lawful for the holders of two-thirds or more of the partnership shares for the time being to expel any partner by giving him notice thereof under their hands in the form thereby prescribed; and that immediately after giving such notice a notice of the dissolution as to the expelled partner should be signed by the partners and published; with power to any other of the expelling partners to sign the name of the expelled partner; and it was provided that if a partner became bankrupt, insolvent, or was expelled, his interest should cease as to profit and loss as if he had died on the day of such bankruptcy, insolvency, or expulsion; and that the amount of his share should be ascertained and payment secured by the same arrangement as would have been applicable in case of his decease; and it was also provided that the shares of retired, deceased, bankrupt, insolvent, or expelled partners should be disposed of in such way, either to or between some or all of the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of shares should determine. The articles provided that in the case of making certain arrangements, there should previously be a meeting of the partners in committee, but did not express that any such meeting should be necessary previous to the exercise of the power to expel." Then (omitting certain details as to the mode of assessing the value of shares which it is unnecessary to refer to), the note goes on: "*Held*, that the power of expulsion of a partner might be exercised by two-thirds of the partners without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion; but that the power must be exercised with good faith, and not against the truth and honour of the contract. That such a power must be understood to exist, not for the benefit of any particular partners holding two-thirds or more of the shares, but for the benefit of the

(1) Seneca, Med. v. 199, 200. (2) 10 Hare, 493.

1874

WOOD v. WOAD.

whole society or partnership. That it could not be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value." So far, I entirely agree with what is laid down, and I think it applicable to this case because, in my opinion, there is enough on this record to show a collusive and unlawful exercise of power on the part of the committee. The note goes on: "That the power was not properly exercised at the exclusive instance of one partner, and, in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners." Now, on the most favourable state of circumstances that can be imagined for the committee, supposing there was a complaint before them which would afford a just ground of suspicion, supposing that conduct had been proved against the plaintiff which would, if unexplained, shew him to be unworthy to continue a member of the society, yet this decision is in point to shew that it was incumbent on them to give the partner the opportunity of stating his case, and that to act without giving him that opportunity was wholly wrongful and unlawful. The decision, therefore, is clearly in point; it establishes that the act being wholly wrongful and unlawful it had no legal effect; it was absolutely void, and did not cause the plaintiff to cease to be a member of the partnership. This appears clearly by the form of the decree in *Blisset* v. *Daniel* (1): "Declare that the notice of expulsion given to the plaintiff on the 20th of August, 1850, was void, and that the plaintiff did not by virtue thereof cease to be a partner in the co-partnership firm of John Freeman's Copper Company," and accounts were accordingly directed on that footing. And so I apprehend it is here. The claim in this action is for damages sustained by reason of the expulsion of the plaintiff from the association; but in law the plaintiff has sustained no damage at all, for whatever rights he may have possessed before he possesses still, as if no act had been done calculated to deprive him of them.

I must add one word on the case of *Beaurain* v. *Scott* (2), which,

(1) 10 Hare, at p. 538. (2) 3 Camp. 388.

from my imperfect remembrance of the case, I was in hopes might have assisted the plaintiff by shewing that, though the act of expulsion was void, yet, being wrongful and unlawful, the plaintiff might maintain an action for damages, though there was no actual loss. But, on referring to that case, I find that the act there done was an exercise of judicial authority, the pronouncing of a decree of excommunication in an Ecclesiastical Court, which, if done without jurisdiction, is an indictable offence, and is of so important a nature as to inflict damage in law without more. Besides which, the additional fact occurred there that the excommunication was publicly read, during divine service, in the plaintiff's parish church. Under these circumstances, it was held that an action would lie, although the sentence was without jurisdiction, and therefore void. The case here is totally different.

Therefore, although I should be glad to feel at liberty to decide otherwise, I come to the conclusion that the act of expulsion was really of no effect at all, that the plaintiff might have altogether disregarded it, and that he cannot maintain this action against the defendants.

For the same reasons the rule to set aside the nonsuit must be discharged.

CLEASBY, B. I have arrived at the same conclusion, though not precisely upon the same grounds. I do not proceed on the ground that there was an absence of damage, because I should have thought that the rule applied that wherever there is a wrong there is in law a damage; and that if the plaintiff was entitled to be a member, the de facto exclusion of him (for, by the rules, from the moment of notice being served on him he would have no claim on the association) would give him a right to maintain an action. But I must say that I am not satisfied that under the circumstances of the present case the committee are liable to the plaintiff for the manner in which they exercised their functions. It is to be observed that the declaration states that the committee expelled the plaintiff "without any just, reasonable, or probable cause whatsoever for such expulsion, and without having given the plaintiff any notice that his conduct was to be investigated and adjudicated upon." Now, we may suppose either that the com-

1874

WOOD v. WOAD.

mittee expelled the plaintiff without just cause and without giving him notice, or that they expelled him without just cause but did give him notice; and the declaration is framed so as to comprehend in the breach both modes of wrongful expulsion. Assuming, however, that we are to take it that the committee expelled him without just cause and gave no notice, I still doubt whether this is any ground for an action. It appears that by one of the rules the committee is to have "the entire control of the funds, affairs, and concerns of the society, and shall determine upon the admission, rejection, and exclusion of any vessel insured or proposed to be insured by it," and their decision is to be final and binding on all parties, unless when they afterwards see cause to alter and do alter the same. Now are these persons liable in respect of the manner in which they act in the discharge of their duties, and in respect of any negligence or irregularity they may commit in so acting? Suppose they refuse to admit of a ship being entered which a member of the society proposes for insurance, are they liable to be sued for improperly rejecting it? And similarly, if a claim is made in respect of a loss, are they liable to be sued by any disappointed person in respect of their settlement of the claim? This is not the question of whether there is a remedy in Chancery, which might be open to different considerations, but whether there is a right of action. They are to act on "suspicion." This is ordinarily a most unsafe ground to act upon, but here, from the nature of the case, it is deemed essential that they should so act. The result of their determination is not to be considered as a decree or judgment, but as an exercise of discretion; and can we try the question of whether their "suspicion" was just and reasonable? I do not think their office exposes them to an action on the case for their conduct in executing it. Therefore, if the question was whether fraud would give a ground of action, I should be reluctant to pronounce that it would do so.

But, in the second place, I have no hesitation in saying that the declaration omitting the word "fraudulently" is intentionally framed so as not to place the plaintiff in the position of being compelled to prove mala fides, and on this ground I think the nonsuit was right. Fraud is not made the gravamen of the complaint. The word "collusively" is a loose expression which does

not necessarily import mala fides. In *Batterbury* v. *Vyse* (1) the collusion alleged involved a charge of a particular and specific nature, because the party who had employed the plaintiff had undertaken to pay him only on the certificate of the architect; and the plaintiff alleged that the defendant, colluding with the architect, procured him to withhold his certificate. There was therefore a particular and specific act charged, an act done by his procurement. That case, therefore, is no authority for giving the word "collusively," as used here, a sense importing fraud. On that ground, it appears to me that we ought not to hold that a cause of action is alleged in this declaration, even if any action could be maintained at all in respect of the acts of the committee.

On the first ground I do not express a decided opinion, but on the second I concur in giving judgment for the defendants.

POLLOCK, B. I am also of opinion that the defendants are entitled to judgment. The case is one involving several important principles of law, and in which those principles are a good deal taxed in their application.

In the first place, I think there is no force in the defendants' objection that the plaintiff failed to shew a cause of action because he did not shew that he had a ship insured. The allegation that he was a member of the association and had paid his money for the benefits belonging to that membership, is quite enough to give him an interest sufficient to maintain this action, if on other grounds he can maintain it.

In the second place, I think there is nothing in the point that this is a co-partnership; because, although as between the plaintiff and the whole body of members the objection would prevail, and the plaintiff must resort to equity for relief, yet it is competent to him to bring his action against these twenty defendants, who are, as it were, taken out of the partnership to form a committee for the management of the partnership affairs, if they are guilty of a wrongful act which substantially affects the plaintiff's position.

Then the question is, Does the substance of the declaration shew a legal cause of action? It alleges that the defendants did wrongfully, collusively, and improperly expel the plaintiff from

(1) 2 H. & C. 42; 32 L. J. (Ex.) 177.

1874

WOOD v. WOAD.

the said society. Now, it is conceded that the word "expelled" does not mean a physical expulsion, but is used to express what the committee did when they served the plaintiff with the notice that they had excluded him. But to say that merely passing a resolution to exclude or serving a notice of exclusion is, under the circumstances, so improper an act as to be contrary to a nice sense of justice, or even to entitle the plaintiff to proceed against the whole body to enforce his rights as a partner is one thing; to say that it would entitle him to bring an action against those who were guilty of that improper act is quite another. And, though I am not quite clear as to this, upon the whole I think the allegations in the declaration are not sufficient to cover what the plaintiff is bound to establish in this action, and what the declaration would have bound him to establish if he had used the word "fraud." The word "collusive" may be used in the sense of "fraudulent;" but if the pleader chooses to use words of a doubtful meaning, they must be taken most strongly against him. Otherwise the plaintiff, on going down to trial, would put a proposition of doubtful meaning before the jury.

But suppose the plaintiff right as to that; still the difficulty remains that the declaration merely amounts to this, that what the defendants have done is a void act, and if so, where is the damage to the plaintiff? Can it be said that we have here a legal right infringed within the principle of *Ashby* v. *White* (1), so as to entitle the plaintiff to maintain an action for the bare infringement? It may be that there are cases where the plaintiff, charging something in the nature of a conspiracy, might maintain an action without proof of actual damage. There may be such cases; but they are peculiar and do not apply here. The act is a void act, and the plaintiff still remains a member of the society. This conclusion is in accordance with *Blisset* v. *Daniel* (2), and with *Innes* v. *Wylie* (3), which was cited on the trial, where, on a declaration charging the defendant with having excluded the plaintiff from the Caledonian Society, Lord Denman ruled that the plaintiff was in the position in which I have said the plaintiff is here; if the expulsion was wrongful, then, since it was merely a void act,

(1) 2 Ld. Raym. 938.

(2) 10 Hare, 493.

(3) 1 C. & K. 257.

the plaintiff was still a member of the society. I think, therefore, that the defendants are entitled to judgment. And with respect to the rule for a new trial, I think the declaration was purposely framed to bring before the jury a case which could not properly be brought before them, and that the nonsuit should stand.

AMPHLETT, B. I am of the same opinion, and should have added nothing, but that the diversity of opinion as to the grounds of judgment make it necessary for me to state the grounds on which I proceed.

It has throughout appeared to me that the question was, whether or not the plaintiff did, in consequence of the act of the defendants, cease to be a member of the partnership. If not, then no wrong was really done to him for which he can recover damages, for he continues a partner. But if his expulsion had been effected, but by fraudulent means, then no doubt a great injustice would have been done, and one for which he would, in my judgment, be entitled to recover. And I anticipated that it might have been argued for the plaintiff that the members of the partnership had agreed to give the committee a plenary power, and that when they came to the conclusion (having power to do so on mere suspicion) that a member should no longer continue such, then, however wrong or improper their conduct in arriving at that conclusion might be, the expulsion was complete, and that member was no longer a member of the partnership. If that had been so, then I think the allegations in the declaration would have been sufficient to make it good; for though the word "fraudulently" is not used yet it is said that "the defendants well knowing the premises, but wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity as aforesaid, did wrongfully, collusively, and improperly expel the plaintiff from the said society;" and (but for the doubts expressed by my learned Brothers) I should not have doubted that this allegation was amply sufficient to support the action. But the case comes to this, that the plaintiff has, according to the allegation in the declaration, been expelled collusively and without giving him the opportunity of explanation; and it is impossible to hold that the co-partnership

1874

WOOD v. WOAD.

could get any benefit from the fraudulent conduct of the committee or an improper and collusive exercise of their authority. Or, taking the specific allegation of the declaration, could the committee be justified in any case in expelling a member by "deeming his conduct to be suspicious," without communicating with him and giving him the opportunity of removing the suspicion? Now, the case of *Blisset* v. *Daniel* (1) is express upon this point. There it was in the power of two-thirds of the partners to exclude any partner without cause assigned; but their exercise of this power was held to be invalid because it was not done bonâ fide. It was held that they ought to have given the partner an opportunity of being heard, otherwise one person might have conceived a prejudice against him, and might behind his back have impressed the minds of others with the same prejudice and prevailed on them to act upon it; whereas, if he had been heard, he might have removed the unfavourable impression. And it was said by the Court that if, the day after their exercise of this power was declared invalid, they should meet again and, after giving the man a proper hearing, should pass the same resolution, and the Court were satisfied that it was done bonâ fide, and not out of revenge because the plaintiff had filed the bill, the Court would not interfere. Now, according to the allegations in the declaration, the defendants never gave the plaintiff that opportunity, and I cannot entertain a doubt that if this allegation were proved, the plaintiff would, by filing a bill in a court of equity, be restored to the enjoyment of his rights. But if so, what is his damage? He has not ceased to be a member of the society; he has not lost the rights of a member. He is to recover damages for what? For an attempt to expel.

Further (though this is not the ground of my decision), it would be very inconvenient to try the question whether the plaintiff was rightfully expelled in the absence of the numerous other partners who are interested in having the question investigated. This ought not to be left out of consideration, because the Courts have refused to entertain actions between partners very much on that ground. If the Court cannot do complete justice, it will not entertain the action. The same ground of inconvenience applies

(1) 10 Hare, 493.

here. Moreover, I should be surprised to find that the plaintiff could both file his bill in Chancery against the society to enforce a restoration to his rights, and also recover damages in an action at law against the defendants. The result is, that if the allegations in the declaration are true, the plaintiff has never been effectually expelled, and if not expelled he has no cause of action.

1874

WOOD v. WOAD.

Judgment for the defendants on the demurrer, and rule discharged.

Attorney for plaintiff: *Eley.*
Attorneys for defendants: *Williamson, Hill, & Co.*

HERMITAGE *v.* KILPIN.

May 26.

Debtors Act, 1869, *s.* 5—*Order of Commitment—Lapse of more than one Year between Order and Arrest—Common Law Procedure Act*, 1852, *s.* 124.

An order of commitment by a superior court under the Debtor's Act, 1869, s. 5, need not be executed within a year from its date, but remains in force as long as the judgment which it is issued to enforce.

In this case judgment by default was signed for 30*l.* 17*s.* 1*d.* on the 2nd of January, 1872. On the 23rd of April, 1873, Martin, B., made an order of commitment for six weeks, or until payment, under the Debtors Act, 1869 (30 & 31 Vict. c. 62), s. 5, and on the same day the order was delivered to the sheriff of Sussex. On the 21st of February, 1874, a "concurrent order" was issued directed to the sheriff of Surrey, which was dated nunc pro tunc as of the 23rd of April, 1873. The sheriff of Surrey arrested the defendant on the 8th of May, 1874. On the 9th a summons was taken out on his behalf, calling on the plaintiff to shew cause why he should not be discharged out of custody. Upon the hearing before Denman, J., at chambers the learned judge referred the matter to the court. A rule was accordingly obtained in the terms of the summons, on the ground that more than one year had elapsed between the date of the original order and the arrest.

The Debtors Act, 1869, s. 5, enacts that, "Subject to the pro-

1874

HERMITAGE v. KILPIN.

visions hereinafter contained and to the prescribed rules, any court may commit to prison, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent court. . . . . Persons committed under this section by a superior court may be committed to the prison in which they would have been confined if arrested on a writ of capias ad satisfaciendum, and every order of committal by any superior court shall, subject to the prescribed rules, be issued, obeyed, and executed in the like manner as such writ." It is further enacted by the same section, that imprisonment is not to operate as satisfaction. The prescribed rules are silent as to the time during which an order of committal is to be in force.

By the Common Law Procedure Act, 1852, s. 124, it is enacted that "a writ of execution issued after the commencement of this Act, if unexecuted, shall not remain in force for more than one year from the date of such writ, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ in the manner indicated in the section.

Arbuthnot shewed cause. It must be admitted that the "concurrent order" must be taken to be of the same day as the original order, and the question therefore is, whether s. 124 of the Common Law Procedure Act, 1852, applies to orders of commitment under the Debtors Act, 1869. If so, the judge's order came to an end before the arrest. But the language of s. 5 of the latter Act applies only to the mode in which the order is to be issued, obeyed, and executed, and does not limit the time within which it is to be executed. There is no provision in the rules as to renewal, although in the rules made by the county courts under the section, it is expressly provided (r. 16) that "an order of commitment made under the Act shall continue in force for one year from such date, and no longer;" and the rules being silent the order is in force (as at common law a writ of ca. sa. would have been:

Chitty's Archbold, 12th ed. p. 528) in infinitum, or, at all events, as long as the judgment. There is no reason for applying the statutory limitation imposed on writs of ca. sa. to these orders. There is no analogy between a procedure under which the arrest was a matter of right, and operated as an extinguishment of the debt, and an order of commitment, which is in the discretion of a judge, and which does not extinguish the debt.

Pinder, in support of the rule. The 5th section provides not only that orders shall be issued and obeyed, but also that they shall be executed in like manner as writs of ca. sa.; and the execution of a ca. sa. must by s. 124 of the Common Law Procedure Act, 1852, be within a year, although at common law its duration was unlimited: *Simpson* v. *Heath*. (1) The language of the rule with regard to county court orders strengthens the defendant's contention. For the part of s. 5 relating to county court orders does not contain any similar provision as to the *execution* of such orders. An express rule was therefore necessary to limit their duration. The inconvenience of holding orders of committal unlimited would be great.

KELLY, C.B. My learned Brothers think that these orders of commitment are unlimited in duration, or, at all events, last as long as the judgment; and although the inclination of my own opinion is, that the words "executed" in s. 5 of the Debtors Act, 1869, are sufficient to indicate that the order was to be limited in time, in like manner as writs of ca. sa., I do not desire formally to dissent from their judgment.

CLEASBY, B. There is no à priori reason why we should apply the rules regulating writs of ca. sa. to orders of commitment under the Debtors Act, 1869. A writ of ca. sa. was matter of right. An order of commitment is only issued when the judge is satisfied on affidavit that a debtor has, or has since judgment had, means to pay, and has refused or neglected to do so. Again, the old writ when executed operated as a satisfaction of the debt; the order does not. The question then is, whether the new Act does expressly, or by implication, limit the duration of the order. Now

(1) 5 M. & W. 631.

1874

HERMITAGE v. KILPIN.

everything is left to the "prescribed rules," which do provide for the mode of service of the summons, the hearing before the judge, the form of order, and the issue of concurrent orders; but nothing is said about the mode of execution, a part of the procedure on a ca. sa. which is treated at length in the old text-books, and deals with such questions as by whom, when, where, and how the writ was to be executed. That is left on the section itself, which provides for the order being issued, obeyed, and executed "in like manner" as a writ of ca. sa. These words, in my opinion, apply to the mode only of executing the order, and not to the time within which it is to be executed. This rule, therefore, must be discharged.

POLLOCK, B. In my opinion the language relied on by Mr. Pinder applies to the machinery of execution only. I had some doubt upon the matter when the rule was moved, but Mr. Arbuthnot has satisfied me that there is no reason why we should apply to these orders, which are new creatures of the legislature, the whole of the law applicable to the old writ of ca. sa. I think the order lasts as long as the judgment, but will come to an end when that cannot longer be enforced.

AMPHLETT, B., concurred.

Rule discharged.

Attorneys for plaintiff: *Robinson & Preston.*
Attorneys for defendant: *Garrard & James.*

CROSSE *v.* RAW.

1874
June 4.

Landlord and Tenant—Covenant to pay "Outgoings"—Duty to make Drain.

In a lease of a house and premises by defendant to plaintiff, the plaintiff covenanted with the defendant to "bear, pay, and discharge the sewers rate, tythes, rent-charge in lieu of tythes, and all other taxes, rates, assessments, and outgoings whatsoever which at any time or times during the said demise should be taxed, rated, charged, assessed, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved" (excepting landlord's property tax):—

Held, that the plaintiff could not recover from the defendant the expenses of making a drain, which, under 29 & 30 Vict. c. 90, s. 10, the defendant, as "owner," might have been required by the sewer authority to make, but which the plaintiff had made under an arrangement with the defendant by which the expense was to be borne by the party liable.

SPECIAL case, stating the following facts:—

By indenture dated the 21st of October, 1865, the defendant demised to the plaintiff a house and premises, situate at Hornsey, for a term of twenty-one years from the 25th of March, 1865, at a rent of 160*l.*, "free and clear of all rates, taxes, deductions, and outgoings whatever"; the plaintiff covenanting to pay the rent reserved "free and clear of and from the sewers rate, tythes or rent-charge in lieu of tythes, and all other rates, taxes, charges, assessments, and deductions whatsoever, the landlord's property tax only excepted," and also during the term to "bear, pay, and discharge the sewers rate, tythes, rent-charge in lieu of tythes, and all other taxes, rates, assessments, and outgoings whatsoever which at any time or times during the said demise should be taxed, rated, charged, assessed, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved (except as aforesaid)."

The drainage of the plaintiff's house consisted of a drain emptying itself into a sewer vested in the Hornsey Local Board, which emptied itself into a brook called the Moselle, and this brook fell into the river Lee.

In consequence of various proceedings restraining the Local Board from continuing to allow their sewage to flow into the river

1874

CROSSE v. RAW.

Lee, an Act was obtained by them (the Hornsey Local Board Act, 1871, 34 & 35 Vict. c. cxxix.), under which they proceeded to construct a sewer to connect the sewers of the district with the high-level sewer of the Metropolitan Board of Works.

This sewer ran in front of the plaintiff's house, and during its construction the clerk to the local board served the plaintiff, who occupied the house himself, with a notice calling his attention to the fact that the sewer was being constructed, and to the provisions of 29 & 30 Vict. c. 90, s. 10; but they did not serve on the "owner" any notice under that section requiring him to make a drain communicating with the sewer. (1)

In pursuance of an arrangement between the plaintiff and the defendant, a connecting drain was made by the plaintiff (with the permission of the local board), at a cost of 45*l.* 12*s.*, on the understanding that the expense should be borne by the party liable.

The question for the opinion of the Court was, whether the defendant was liable to repay to the plaintiff the sum paid by him for making the said connection.

Prentice, Q.C. (with him *Michael*), for the plaintiff. The question

(1) By 29 & 30 Vict. c. 90, s. 10, "If a dwellinghouse within the district of a sewer authority is without a drain, or without such drain as is sufficient for effectual drainage, the sewer authority may by notice require the owner of such house, within a reasonable time specified, to make a sufficient drain, emptying into any sewer which the sewer authority is entitled to use, and with which the owner is entitled to make a connection, so that such sewer be not more than 100 feet from the site of the house of such owner. . . . . And if the person on whom such notice is served fails to comply with the same, the sewer authority may itself, at the expiration of the time specified in the notice, do the work required, and the expenses incurred by it in so doing may be recovered from such owner in a summary manner."

By the operation of 31 & 32 Vict. c. 115, s. 11; 29 & 30 Vict. c. 90, s. 14; and 18 & 19 Vict. c. 121, s. 3, "the word 'owner' includes any person receiving the rents of the property in respect of which that word is used from the occupier of such property."

It was among the points in the present case that the plaintiff's house was not within 100 feet of the sewer (which turned on the question, what was the proper mode of measurement?), and that the owner could not therefore have been compelled to make a communication with it; and further, that the owner had not, in fact, been required to do so; nor was it stated as a fact that the existing drain was insufficient; but the decision of the Court on the construction of the lease made it unnecessary to argue these points.

is, supposing the defendant had done that which it was his duty as owner to do under 29 & 30 Vict. c. 90, s. 10, could he have recovered the cost from the plaintiff under the covenant in the lease? If not, then the plaintiff, having done the work under an arrangement by which the expense was to be borne by the party liable, can recover the amount from the defendant. *Tidswell* v. *Whitworth* (1) is a distinct authority to shew that the defendant could not have recovered, whether he had done the work himself, or paid an assessment made on him by the local board, as having done it on his default. The duty of making the drain was one imposed on the defendant, as in the case cited the duty was imposed on the plaintiff; but it is impossible to say that that duty was a "tax, rate, assessment, or outgoing" imposed "on the premises, or on the tenant or landlord in respect thereof."

Herschell, Q.C. (with him *Holl*). The distinction between an outgoing imposed on the defendant and an outgoing rendered necessary by a duty imposed on him, is a distinction without a difference. The case of *Tidswell* v. *Whitworth* (1) is distinguishable on the ground that the words there only included "taxes, charges, &c., taxed, assessed, or imposed upon or in respect of the premises thereby demised, or any part thereof;" here the words are added "or upon the landlord or tenant in respect thereof;" and the word "outgoings," the most extensive word possible, is also added to the words "taxes, rates, and assessments." It is impossible to deny that the cost of making the drain, if incurred by the defendant under 29 & 30 Vict. c. 90, s. 10, would have been an outgoing imposed on him as landlord, and therefore within the covenant. The case falls within *Sweet* v. *Seager* (2), and *Thompson* v. *Lapworth* (3), the latter of which cases was later than *Tidswell* v. *Whitworth* (1), and was decided in effect upon words similar to those which occur here.

Prentice, Q.C., in reply. In *Thompson* v. *Lapworth* (4) the case was expressly distinguished from *Tidswell* v. *Whitworth* (1), on the ground that the charge was not one imposed on the landlord by reason of his default in performing his statutory duty; and in the

(1) Law Rep. 2 C. P. 326.
(2) 2 C. B. (N.S.) 119.
(3) Law Rep. 3 C. P. 149.
(4) Law Rep. 3 C. P. 149, at pp. 152, 154, 161.

1874

CROSSE v. RAW.

circumstance, that the charge, or outgoing would have only arisen from the defendant's default, the present case and *Tidswell* v. *Whitworth* (1) agree.

BRAMWELL, B. I am of opinion that our judgment must be for the defendant. I go a long way with the argument which my Brother Willes described in *Thompson* v. *Lapworth* (2) as a captivating one, that the landlord would be liable for what may be called capital expenditure, but not for expenditure which should be charged against revenue.

But, in many of these cases, one cannot help seeing that the intention is that the landlord shall be liable for neither; and I can hardly conceive stronger words for effecting that purpose than those which are used here. The plaintiff has covenanted to "bear, pay, and discharge" all "outgoings whatsoever, which at any time or times during the said demise shall be taxed, rated, charged, assessed, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof." Now how has this obligation arisen? A drain was to be made from the plaintiff's house into the sewer of the local board by the landlord, or, if he failed to do it, by the local board. In fact, it was made by neither, but by the plaintiff; but under the arrangement between the parties, we must consider what was the duty of the defendant in respect of it. It is said that it was the duty of the defendant to make the drain, and that if he had done so, the expense would not have been an outgoing, "taxed, rated, charged, assessed, or imposed" upon or in respect of the premises. Now the point so stated seems to be scarcely arguable; for the argument in substance is, that if the local board had a right to make the drain in the first instance, and charge the expense on the defendant, it would be an outgoing imposed on the landlord in respect of the premises; but if they had a right to compel the defendant to do it, and he did it, it would not be an outgoing imposed on him in respect of the premises. This seems preposterous. It would certainly be something which had gone out, an expense which he had been at in respect of the premises, and it would have been an expense imposed upon him; and the plaintiff would there-

(1) Law Rep. 2 C. P. 326. (2) Law Rep. 3 C. P. at p. 158.

fore have been bound to indemnify him against it. I cannot see any distinction between this case and *Thompson* v. *Lapworth* (1), except that there it was not the duty of the landlord but of the local authority to do the work, and the landlord was to pay what was assessed; a distinction which is utterly unsubstantial. That case then is in point; and I think it was properly distinguished from *Tidswell* v. *Whitworth* (2), which, as I understand it, was, I think, rightly decided. The defendant, therefore, is on this ground entitled to judgment, and we need not consider the other grounds on which the defendant contends that the plaintiff is unable to recover.

POLLOCK, B. I am of the same opinion. In the absence of authority, I should have thought that a charge paid in consequence of the making of a sewer, whether by or on the requirement of the local authority, was an outgoing charged on the demised premises, or on the landlord or tenant in respect thereof. It is not strictly charged on the premises, but it is charged in respect of them. And it is certain that the general scope and intention of the covenant and the reservation was, that the landlord should get the rent clear of all charges whatsoever. This conclusion is supported by *Sweet* v. *Seager* (3), and *Thompson* v. *Lapworth.* (1) The only case which might at first sight seem to raise a doubt is *Tidswell* v. *Whitworth* (2); but the words there were much more limited, and, without questioning that decision, I think it need not prevent us rom coming to a conclusion in favour of the defendant.

Judgment for the defendant.

Attorney for plaintiff: *E. W. Crosse.*
Attorneys for defendant: *Underwood & Colman.*

(1) Law Rep. 3 C. P. 149. (2) Law Rep. 2 C. P. 326.
(3) 2 C. B. (N.S.) 119.

1874
June 8.

NEVILL *v.* BRIDGER.

Burial Fees—Selection of Site—Opening Vault—Non-parishioners—Contract.

A vicar of a parish, being freeholder of the church and churchyard, may make a special contract for the payment of a fee, other than the customary burial fee (if any), for the burial of a non-parishioner in a particular vault in the parish church.

Ex parte Blackmore (1 B. & Ad. 122) followed.

Appeal from the Berkshire County Court.

The plaintiff is the Vicar of Wraysbury, Bucks, and originally sued the defendant, the executor of one Elizabeth Davies, for what were described in his particulars as "fees in connection with the burial of the late Mrs. Davies." At the hearing it was objected by the defendant that the Court had no jurisdiction, on the ground that the fees were recoverable, if at all, only in the Ecclesiastical Court. Thereupon the plaintiff's counsel stated that he proposed to rely upon a special contract by the defendant to pay the moneys sued for, and the particulars were by leave amended thus: "for that it was agreed between the plaintiff and the defendant that in consideration that the plaintiff (then being Vicar of Wraysbury) would give his consent, licence, and permission to the defendant to bury the body of Mrs. Elizabeth Davies in the parish church of Wraysbury, and would do and cause to be done in the said church all things necessary and incidental to the said burial in and about the opening of a vault, and otherwise, the defendant promised the plaintiff to pay him a certain sum of money, to wit twenty guineas; and the plaintiff says that he gave his consent, &c., and the body was buried accordingly, and all things were done, &c., yet the defendant has not paid the said sum of twenty guineas." The defendant objected to this amendment.

It was proved that in 1852 Henry Davies, husband of the deceased, was buried in a brick grave in the aisle of Wraysbury church, belonging to the family of Mrs. Davies. He was not a parishioner, and his friends paid the vicar 21*l.*, such sum being the amount charged in Wraysbury for the burial of non-parishioners. On the 24th of January, 1868, Mrs. Davies died. She was not a parishioner at the time of her death. By her will

she left directions that she was to be buried in Wraysbury church near her husband. The defendant accordingly authorized an undertaker to make the necessary arrangements and do all that was requisite for that purpose. The undertaker communicated with the authorities on the spot, and applied for permission to open the vault, and to bury Mrs. Davies there. On being informed the fees would be high, he stated that he had conducted Mr. Davies' funeral in 1852, and had paid the charges made in respect thereof. The necessary consent was then given, the brick grave was opened, and Mrs. Davies interred therein. The defendant was present at the funeral.

The parish clerk, who had lived in the parish fifty years, and succeeded his father in office in 1845, produced an old book from the iron chest in the parish church, containing, among other things, in the handwriting of the deceased vicar, a scale of fees. These he stated to have been in force as long as he could remember. According to this scale the charge for opening a vault in the church for the burial of a non-parishioner was twenty guineas.

Soon after the funeral this sum was demanded of the undertaker, and a cheque promised. The defendant, however, upon the matter being brought to his notice, demurred to the charge as excessive, and declined to pay it.

The learned judge found that the sum claimed was a reasonable one and was that customarily charged by and paid to the vicars of Wraysbury for their consent to the burial of non-parishioners within the parish church, and for leave to open the soil for that purpose, and that the defendant had by his authorized agent agreed to pay such reasonable amount as should be required, and gave judgment for the plaintiff for 21*l.* From this judgment the defendant appealed.

The questions were, first, whether the judge had power to amend the particulars; and, secondly, whether the Court had jurisdiction to entertain the plaintiff's demand as set forth in the amended particulars; and, thirdly, whether the verdict could be supported with or without the amendment.

Bayford, for the appellant. First, this amendment ought not

1874

NEVILL v. BRIDGER.

to have been made, as without it there was no cause of action of any kind. [The Court intimated that they thought the amendment a proper one.] Secondly, the plaintiff is not entitled to recover on the original particulars. They treat the claim as one for burial fees. But these can only be recovered in the Ecclesiastical Court: *Spry* v. *Gallop.* (1) Moreover, they must have existed from time immemorial, for, unless by custom, they are not demandable: *Andrews* v. *Cawthorne.* (2) Here there was no evidence of any customary payment. The amount is unreasonable considering it as a customary fee: *Bryant* v. *Foot.* (3) Lastly, he cannot recover on the amended particulars. Such a contract as that alleged is void as against public policy. The vicar is freeholder of the church and churchyard, but he cannot make a profit by charging exorbitant fees for selection of site. It is true he may not be bound to bury a non-parishioner, nor to bury in any particular spot in the church or churchyard, but if he consents to do so he ought not to be permitted to make a charge over and above the ordinary burial fee, if any. The only guide for the exercise of his discretion is the fitness of the person to be buried: Gibson, Codex, 2nd ed. p. 453; *Rich* v. *Bushnell.* (4)

H. D. Greene, contrâ. The plaintiff rests his case on the particulars as amended. The clergyman has the right to select the place where a body is to be buried: *Fryer* v. *Johnson* (5), and a valid contract may be made with him to pay any sum which he may think fit to charge. *Ex parte Blackmore* (6) is decisive. There a rector declined to bury in a particular vault unless a fee fixed by himself were paid, and the Court refused a mandamus to compel him; and Littledale, J., says (at p. 124): "If a rector is asked to do that which by law he is not bound to do, he may refuse, except upon certain conditions:" see also *Palmer* v. *Bishop of Exeter* (7); *Maidman* v. *Malpas* (8); *Andrews* v. *Cawthorne.* (9) Again, as Mrs. Davies was a non-parishioner, the plaintiff might have declined to permit her to be buried in the church or church-

(1) 16 M. & W. 716; 16 L. J. (Ex.) 218.
(2) Willes, 536.
(3) Law Rep. 2 Q. B. 161; Law Rep. 3 Q. B. 497.
(4) 4 Hagg. Eccl. 164.
(5) 2 Wils. 28.
(6) 1 B. & Ad. 122.
(7) 1 Str. 576.
(8) 1 Hagg. Consist. 208.
(9) Willes, 538, n.

yard altogether. There is nothing against public policy in a contract for an extra fee in such a case. If it were not levied the churchyard might soon be overcrowded.

Bayford, in reply. *Ex parte Blackmore* (1) only decides that no mandamus would be granted, and the point now made was not argued. On public grounds, perhaps, as in the case of danger or inconvenience from overcrowding, a fee might be imposed. But no such suggestion was made in the present case.

BRAMWELL, B. Three questions were raised in this case, which has been very well argued on both sides. The first was, as to whether the county court judge was right in directing the particulars to be amended, and we are of opinion that he was. The particulars in their amended form are no more than an expansion of the original statement of the plaintiff's claim. Secondly, the judge found as a matter of fact that the defendant had agreed to pay a reasonable fee, and that 21*l.* was a reasonable fee. Even if his conclusion were wrong, we should not interfere with it unless it were shewn that there was no evidence to justify it. But we think that he was right upon this point also. Thirdly, the question was raised whether such a bargain as was made here was capable of being enforced, and it was contended that, although the plaintiff is the freeholder of the church and churchyard, and consequently with him rests the power of refusing to allow any interference with the soil, yet that he is to exercise that power solely with regard to the fitness of the person whom it is proposed to bury, and must not make the payment of money a condition of his assent. It was said that this fee was in truth a burial-fee, and not due therefore except by immemorial custom, and that an express contract to pay such a fee was void. Some of the authorities certainly countenance this view, and especially the passage cited by Mr. Bayford from Gibson's Codex (2nd ed. p. 453). But the current of authorities is the other way. Thus we have the authority of Sir William Scott in *Maidman* v. *Malpas* (2), the case of *Palmer* v. *Bishop of Exeter* (3), the opinion of Abney, J., in *Andrews* v. *Cawthorne* (4), and that of Littledale, J., in *Ex parte Black-*

(1) 1 B. & Ad. 122.
(2) 1 Hagg. Consist. 208.
(3) 1 Str. 576.
(4) Willes, 538, n.

1874

NEVILL v. BRIDGER.

more (1), and the text writers upon the subject treat these cases as decisive.

It may be that upon some occasion these authorities may be successfully questioned. But, in the present case, there is no appeal from our decision, and we should not, even assuming we disapproved of them—which I am far from saying that we do—be justified in running counter to them. Our judgment will therefore be for the plaintiff.

PIGOTT, B., concurred.

Attorney for plaintiff: *Charles Thomas Phillips.*
Attorneys for defendant: *Bridger & Collins.*

June 9.

THE WESTERN COUNTIES MANURE COMPANY *v.* THE LAWES CHEMICAL MANURE COMPANY.

Defamation—Disparaging Statement about Goods—False and malicious Publication.

The defendants falsely and without lawful occasion, published a statement disparaging the quality of the plaintiffs' goods, and special damage resulted from the publication:—

Held, actionable.

Young v. *Macrae* (3 B. & S. 264; 32 L. J. (Q.B.) 6) distinguished.

DECLARATION, that at the time of the committing, &c., the plaintiffs carried on business as manufacturers and sellers of artificial manures, and had upon sale certain artificial manures, and the defendants also carried on business as manufacturers and sellers of artificial manures, and had on sale certain artificial manures; that the defendants well knowing that the plaintiffs were carrying on the aforesaid business and selling the said artificial manures, and contriving and intending to injure the plaintiffs in their business, falsely and maliciously printed and published, and caused to be printed and published of and concerning the plaintiffs, and of and concerning them as such manufacturers and sellers of artificial manures, the words following:—

"Chemical Laboratory, University of Glasgow, January 29,

(1) 1 B. & Ad. 122.

1874

WESTERN COUNTIES MANURE COMPANY v. LAWES CHEMICAL MANURE COMPANY.

1873. Dear Sir,—I inclose herewith analyses of your four samples of manure, which differ much in quality. They are all mixtures, and do not consist of bones and acid alone. No. 2 (meaning thereby the defendants' artificial manures) is much the best, and seems to contain some kind of phosphatic guano. No. 4 (meaning thereby the plaintiffs' said artificial manures) appears to contain a considerable quantity of coprolites, and is altogether an article of low quality, and ought to be the cheapest of the four. The other two are fair articles and may be usefully employed. It is not for me to put an exact value upon the samples, as the prices charged for manures in different parts of the country differ to an extraordinary extent. I know places where No. 2 (meaning the defendants' said artificial manures), would be sold at about 8*l.* per ton, others, where 7*l.* would be its price. I may state, however, the relative values thus: Suppose the price charged for No. 2 (meaning the defendants' said artificial manures) to be 8*l.* per ton; then No. 1 should be worth 7*l.*; No. 3, 5*l.* 10*s.*; and No. 4 (meaning the plaintiffs' said artificial manures), 5*l.* Of course these must be taken as approximation only, and may be modified by the nature of the bargain; but they should be in these proportions."

[Then followed an analysis in detail, purporting to shew the proportion of phosphates and ammonia in the plaintiffs' and defendants' artificial manures respectively.]

Meaning thereby, that the said artificial manures so manufactured, sold, and traded in by the plaintiffs were artificial manures of an inferior quality to the said artificial manures, and especially were of an inferior quality to the said artificial manures of the defendants. Whereas, in truth and in fact, the said artificial manures so manufactured, sold, and traded in by the plaintiffs were not of an inferior quality, and especially were not inferior in quality to the said artificial manures of the defendants. And by reason of the premises [here followed an allegation of special damage.]

Demurrer and joinder.

June 4. *Arthur Charles*, in support of the declaration. The malicious publication of a falsehood depreciating the plaintiff's

1874

WESTERN COUNTIES MANURE COMPANY v. LAWES CHEMICAL MANURE COMPANY.

goods and causing him pecuniary damage, is actionable: *Harman* v. *Delany*. (1) In *Evans* v. *Harlow* (2), it was held that special damage must be alleged, but it seems to have been assumed there that an action would lie for untrue and disparaging statements about the goods of a tradesman where special damage has been suffered. It must be conceded that these words are not libellous in the ordinary sense; but the case is similar to an action for "slander of title," which, as is pointed out by Tindal, C.J., in *Malachy* v. *Soper* (3), is not "an action for words spoken or for a libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." *Young* v. *Macrae* (4), may be relied on by the defendants. But there all that was decided was that an action will not be maintainable against a man who is only alleged to have made untrue statements about the quality of his own goods. Here there is a distinct statement that the plaintiffs' manures are "altogether of a low quality."

Bowen, contrà. The declaration does not allege that the defendants knew that the statements were false and amounts to no more than a puff by one tradesman of his own goods. *Young* v. *Macrae* (4) is in point, for the ratio decidendi was that the mere comparison by the defendant of his own goods with the plaintiff's to the plaintiff's disadvantage is not actionable: *Burnett* v. *Wells*. (5) The cases of "slander of title" are not analogous to the present case, for in them the plaintiff's proprietary rights are affected. There is no authority which goes so far as to justify the proposition now contended for. In all the cases either the words used amount to a personal imputation on the plaintiff personally or as a tradesman, or else they affect his property. Thus *Harman* v. *Delany* (1), was a slander of the plaintiff personally in the way of his trade.

[POLLOCK, B. This declaration alleges that the statement was made falsely and maliciously, and contriving to injure the plaintiffs.]

(1) 2 Str. 898.
(2) 5 Q. B. 624.
(3) 3 Bing. N. C. at p. 383.
(4) 3 B. & S. 264; 32 L. J. (Q.B.) 6.
(5) 12 Mod. 420.

The mere telling of a falsehood, even though it be told maliciously, does not give a cause of action: *Miller* v. *David.* (1)

Cur. adv. vult.

June 9. BRAMWELL, B. In this case our judgment must be for the plaintiffs. The case may be shortly stated thus. The plaintiffs trade in a certain article of manure, and it is alleged that the defendants falsely and maliciously published of and concerning that manure, and of and concerning the plaintiffs' trade and manufacture, a certain statement which contains in it this,—that it was an article of low quality and ought to be the cheapest of four, of which this is one, the others being mentioned. So far an action would not be maintainable, because it is not libelling an article to say that it is an article of low quality and ought to be cheaper than others. That part is not specifically stated to be untrue, but having been published as it is said of and concerning the plaintiffs' manufactures and trade, the declaration goes on and says, "meaning thereby that the artificial manures so manufactured and traded in by the plaintiffs were artificial manures of inferior quality to other artificial manures, and that they especially were of inferior quality to the artificial manures of the defendants." I think if it stopped there it would not be the subject-matter of an action, even with special damage resulting from it, because I do not see that it is injurious to an article to say that it is of inferior quality. It may attract certain customers, and it is a very good thing that people can be found who will sell things of an inferior quality in order that they may not be wasted. But what makes the action maintainable is the allegation that follows: "Whereas, in truth and in fact, the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior quality, and were not inferior in quality to the said articles of manure of the defendants;" and by reason of the premises, certain persons, who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which

(1) Law Rep. 9 C. P. 118.

1874

WESTERN COUNTIES MANURE COMPANY v. LAWES CHEMICAL MANURE COMPANY.

is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and "maliciously," which possibly may mean nothing more than that it was made falsely, and without reasonable cause, calling for a statement by the defendants on the subject. But if actual malice is necessary—which I do not think is the case—the allegation is sufficient. It seems to me, however, that where a plaintiff says, "You have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers," an action is maintainable.

I do not go through the cases, but undoubtedly there is nothing in any of them inconsistent with the judgment we now pronounce. The only case that I will refer to is *Young* v. *Macrae*. (1) When examined that case will be found to differ materially from this one. The disparaging statement there was not expressly said to be untrue; it was only said generally that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendants' own goods. On the general principle, therefore, that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs.

POLLOCK, B. I agree that our judgment in this case should be in favour of the plaintiffs. This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim "ubi jus ibi remedium." It seems to me the present case comes within that rule. Now, in the first place, this is not an action of libel. I think it is entirely distinguishable from that class of cases. It is alleged in the declaration that the matter complained of here was written. I think that makes no distinction. I will not say more upon that than that the difference between a written or verbal statement of the kind now com-

(1) 3 B. & S. 264.

plained of and an ordinary defamatory statement is very clearly pointed out by Tindal, C.J., in his judgment in *Malachy* v. *Soper*. (1) This action is, I think, in the nature of an action of slander of title, and comes within the general rule laid down as to such actions in Comyns' Digest, where it is said that an action lies when special damage is shewn. (Com. Dig. tit. Action on case for Defamation, G 11.)

The only question, therefore, that seems to arise is, what is the fair intention of the words? It is alleged that the defendants were contriving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. Now I do not attach any special meaning to the word "maliciously," except so far as it must be taken with the words "contriving and intending to injure the plaintiffs." I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind. Therefore we have it stated that without legal occasion, without any necessity, the defendants have used language of and concerning the plaintiffs' goods which not only are false, but are such as to injure the plaintiffs in their business, and special damage is alleged. When all these things concur it seems to me a good cause of action is disclosed. With reference to the cases that have been cited, *Malachy* v. *Soper* (2), *Evans* v. *Harlow* (3), and *Young* v. *Macrae* (4), I would only observe that, in the two first-mentioned cases, there is no allegation of special damage, whilst the last is distinguishable on the grounds mentioned by my Brother Bramwell. Moreover, there the Chief Justice in his judgment (5) supposes a case very like the present one, and states that, in his opinion, an action would lie in such circumstances.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Harris, for Kelly, Plymouth.*
Attorneys for defendants: *Bower & Cotton.*

(1) 3 Bing. N. C. at p. 386.
(2) 3 Bing. N. C. 371.
(3) 5 Q. B. 624.
(4) 3 B. & S. 264.
(5) 3 B. & S. at p. 271.

1874

[IN THE EXCHEQUER CHAMBER.]

June 20.

RICHE *v.* THE ASHBURY RAILWAY CARRIAGE AND IRON COMPANY, LIMITED.

Company—Corporation—Memorandum of Association—Contracts ultra vires—Ratification—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 9, 10, 12.

20 L J 61
16 Q B 337
7 H L 675
2 C L D 776
22 C L D 380

The defendants were incorporated as a limited company under the Companies Act, 1862, the objects of the company, as stated in the memorandum of association, being, "To make, sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land and buildings; to purchase and sell as merchants timber, coal, metal, and other materials, and to buy and sell any such materials on commission as agents." And by art. 4 of their articles of association, "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association, shall take place only in pursuance of a special resolution."

The defendants' directors in January, 1865, entered into contracts on behalf of the company, by which the company became purchasers of a concession granted by the Belgian government for the construction of a railway in Belgium, and contracted with the plaintiff that, through the medium of a société anonyme which the company were to form in Belgium, he should be employed to construct the line, and that they would pay certain sums of money into the treasury of the société anonyme for the purpose of payments being made to him thereout for the construction of the railway. These contracts were afterwards modified in certain particulars by agreements entered into in October, 1865, by the directors on behalf of the company.

In October, 1865, the plaintiff entered on the construction of the line; the société anonyme was formed, and for some time payments were made by the company into the treasury of the société in pursuance of their contract with the plaintiff.

In October, 1865, the directors, being advised that these contracts were ultra vires, projected a company to take them over.

At a general meeting of the company held in November, 1865, a balance sheet was presented showing advances on account of the Belgian contracts; objections were raised to this item, but an assurance having been given by the chairman that it would not appear again, but would be taken over by the proposed company, a resolution approving and adopting the accounts was passed.

On the 20th December, 1866, an extraordinary general meeting of the company was held, and a committee was appointed to inquire into the company's affairs. The committee reported to an extraordinary meeting, held on the 1st of May, 1867, that the Belgian contracts were ultra vires, that they did not bind the company, and that the directors were liable to replace the moneys expended, but recommended an amicable settlement. A committee was appointed in pursuance of this recommendation, and, at an annual meeting held on the 14th of May, 1867 (the circular convening which mentioned as part of the business of the meeting

the consideration and adoption of any report to be made by the committee, and when the advances on the Belgian contracts again appeared in the balance sheet), a resolution was passed, adopting a recommendation of the committee to the effect that certain persons (directors of the company) should "purchase" from the company the Belgian contracts, the company undertaking to take any legal proceedings necessary to enforce the contracts, at the expense and on the indemnity of the purchasers, and reserving their right to maintain that the contracts were ultra vires and not binding on the company; and subject to this resolution the balance sheet was approved.

At another annual meeting, held on the 24th of December, 1867, a formal contract carrying out the resolution of the 14th of May (and which was referred to in the circular convening the meeting) was sanctioned, and the seal of the company affixed, and the entry of "advances" in the balance sheet was altered to "advances to be refunded in accordance with a resolution passed at a meeting of shareholders on the 14th of May, 1867."

In May, 1866, the company repudiated the contracts as being ultra vires.

In an action brought by the plaintiff to recover damages against the company for not continuing to make payments in pursuance of the contracts of January and October, 1865:—

Held (in the Court of Exchequer), first, that the contracts were ultra vires.

Secondly (by Martin and Channell, BB.; Bramwell, B., dissenting), that they had been ratified by the shareholders.

Error being brought:—

Held, that the contracts were ultra vires.

By Blackburn, Brett, and Grove, JJ., first, that the contracts, though beyond the scope of the memorandum of association, were capable of ratification by the individual shareholders, and, secondly, that they had been so ratified.

By Keating, Archibald, and Quain, JJ., first, that the contracts, being beyond the scope of the memorandum of association, were incapable of ratification; secondly, that there was no evidence that they had been in fact ratified by all the shareholders.

Rev'd by H. of L. 7 H. L. 653.

SPECIAL CASE, stated by an arbitrator, in an action brought under the following circumstances:—

The plaintiff (with his brother, since deceased) had previously to 1865 entered into a contract with Messrs. Gillon & Baertsoen, of Belgium, for the construction of a line from Antwerp to Tournai, for which the latter held a concession from the Belgian government.

On the 30th of January, 1865, certain contracts were entered into between Mr. James Ashbury, assistant managing director of the defendant company, and assuming to act as their agent, Messrs. Gillon & Baertsoen, the plaintiff's firm, and a société anonyme (which was to be constituted in Belgium), by which the defendants became the purchasers of the concession, which was to be

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

carried out through the medium of the société anonyme, the société contracting with the plaintiff's firm for the construction of the line by them, and the defendants undertaking to pay into the treasury of the société certain sums for the purpose of providing the plaintiff's firm with cash to carry out the contract.

On the 14th of October, 1865, certain further contracts were made between the same parties, introducing certain modifications into the contracts of the 30th of January.

The plaintiff proceeded to construct the line, and for a time payments were made in pursuance of this arrangement; but in May, 1866, the defendants repudiated all further performance of the contracts, on the ground that they were ultra vires.

The plaintiff maintained that the contracts were not ultra vires, and also that they had been ratified by the shareholders, and he brought the present action.

The whole of the material facts relating to the history of the negotiations and transactions between the plaintiff and the defendants, the substance of the contracts, and the facts relating to the alleged ratification by the shareholders, are fully stated in the judgment of Archibald, J., at pp. 272–284.

The Court was to have power to draw inferences of fact.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover from the defendants any damages in respect of the above matters.

If the Court should be of opinion in the affirmative, then the verdict was to be entered for the plaintiff for such sum as should be assessed by the arbitrator, subject to the directions which the Court should give as to the principles on which such damages were to be assessed, with costs of suit.

If the Court should be of a contrary opinion, then a judgment of non pros. was to be entered for the defendants with costs of defence.

The case was argued on the 3rd and 5th of June, 1872, by *Benjamin* (with him *Pollock, Q.C.*, *Giffard, Q.C.*, and *W. G. Harrison*), for the plaintiff; and by *Sir J. B. Karslake, Q.C.* (with him *Watkin Williams* and *Cohen*), for the defendants.

Cur. adv. vult.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

Nov. 25, 1872. The following judgments were delivered :—

CHANNELL, B. The question which we have to decide is, whether the incorporated partnership, sued under the name of the Ashbury Railway Carriage and Iron Company, Limited, is bound by a contract entered into in its name with the plaintiff.

The question is one to be determined, in my opinion, by the application to the case of the appropriate principles of the law of agency.

In some of the earlier cases quoted in the argument, in which questions were discussed relating to contracts ultra vires of the companies making them, the question was treated as one of illegality. Whatever may be the case with regard to companies which have been specially incorporated by Parliament for a special purpose, and which use the powers so obtained for other purposes, it seems clearly settled by the more recent authorities that in the case of companies such as that in the present case, the persons constituting the company, that is to say, the shareholders, may bind themselves in their corporate capacity by their individual consent to contracts not authorized by the memorandum of association, or other like instrument, by which the constitution of the company is defined. The objection to such a contract is not that it is illegal, and therefore unenforceable, but simply that it is unauthorized by the body whom it purports to bind. If, therefore, the shareholders of a company knowingly hold out their directors as authorized to make, on their behalf, particular contracts, the company will be bound by those contracts, notwithstanding that they are not within the powers expressly conferred on the directors for binding the company. Persons dealing with such companies and their directors are, however, in this respect, in a different position from persons dealing with ordinary trading partnerships, that they are taken to know that the directors' powers are likely to be limited, and they are bound to read the deed of settlement or articles of association limiting the directors' authority. They are not, however, bound to do more: see *Royal British Bank* v. *Turquand* (1), *Totterdell* v. *Fareham Brick Co.* (2), and other cases; and where an act may be brought within the powers

(1) 6 E. & B. 327; 25 L. J. (Q. B.) 317.

(2) Law Rep. 1 C. P. 674.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

of the directors by the compliance with certain formalities, they are entitled to assume that all such formalities have been complied with, and are not bound to inquire into the fact. There is one other point to be noticed, which I quite agree it is important should not be lost sight of, viz. that the shareholders are entitled to assume (unless they are informed to the contrary) that their directors are managing the company in accordance with their powers.

Now, to apply these principles to the case before us. The first question that arises is, whether the contract sued on was one within the actual authority of the directors, that is to say, whether it related to business authorized by the memorandum of association. Now, as to this, I am forced to come to the conclusion that it did not. The only words within which it can come are "the business of mechanical engineers and general contractors." In this expression I think the word "contractor" must be taken to have its popular sense of a man who contracts for the execution of engineering works or the like; and if I could see, looking at the whole of the contracts entered into by the directors of this company in reference to the Belgian railway, that the main object of the scheme was to contract for the construction of the railway or for the supply of its rolling stock, and that what may be called the financing agreements were subsidiary and incidental to the attainment of this main object, then I might be inclined to think that the whole of the scheme might come within the business of "general contractors." It is clear, however, that the company were to have nothing to do with the construction of any works or the supply of any rolling stock. They were merely to enter into a financial speculation, the present plaintiff (or his then firm) occupying the position which would be popularly described as that of "contractor" to the line. Even if the negotiations which took place ineffectually with reference to the defendants supplying the rolling stock had resulted in an arrangement for their doing so, it would rather seem that this contract would have been incidental to the main scheme of the financial speculation, rather than that the latter would have been incidental to the former. It is, I think, impossible to hold that the expression "general contractor" authorized any such contract whatever. I therefore arrive at the

conclusion that the directors had no actual authority to bind the company by the contract sued on at the time when they entered into it. It follows also, from the principles already referred to, that the plaintiff ought to have known of this want of authority, and that if he did not know, he was, at all events at the time of entering into the contract, in no better position than if he had known in fact.

It is, however, argued that the articles of association contemplate the extension of the company's business by special resolution, and whether or not such a resolution had been passed was a matter into which the plaintiff was not bound to inquire, according to the doctrine of *Royal British Bank* v. *Turquand.* (1) I am, however, unable to adopt this argument, at all events to the full extent to which it was pressed upon us. The provision in the articles is that an extension of the company's business beyond the objects already specified shall take place only by a special resolution. A special resolution must be registered in the same place as the articles are registered. Therefore to a person searching at the registry, this provision rather amounts to notice that there has *not* been any extension of the company's business, than that there *has* been.

I do not think, then, that the plaintiff, at the time when this contract was entered into with him, and when he was supposed to know what the registered documents relating to the company would tell him as to the limitation of the directors' authority, was entitled to say that, as between himself and the defendants, the contract was binding upon the defendants. It may, however, have become so subsequently, by what afterwards took place; and in considering the effect of the subsequent conduct of the defendant company and shareholders, it is, perhaps, of some importance to remember that the plaintiff must be taken to know that, according to the constitution of the company, means were provided for formally extending the business of the company so as to include the contract with him.

I now come to the question whether the conduct of the shareholders constituting the defendant company has not made the contract binding upon the company. This question turns upon the

(1) 6 E. & B. 327; 25 L. J. (Q. B.) 317.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

amount of knowledge which the shareholders had of the matter. If the shareholders knew that the directors had entered into this contract on behalf of the company, and that the directors and the plaintiff were continuing to act upon the contract as though it were binding upon the company, then it was, in my judgment, necessary for them to repudiate the contract at once if they meant to do so at all, and to communicate this repudiation to the plaintiff. If they did not do so, but knowingly permitted their directors, and the engineer appointed by them, to deal with the plaintiff as their authorized agents, they in effect held out the directors and the engineer as authorized by them, and have thereby made themselves liable. It may well be that a person who learns that a contract has been made on his behalf by an unauthorized agent with a third party is, as my Brother Bramwell says, not under any legal duty to inform the third party of the want of authority. But this can only be so where the unauthorized agent has ceased his unauthorized acting. If he continues to act as agent to the knowledge of the supposed principal, and without any repudiation by him, the principal must be taken, in my opinion, to have accredited and held out the agent as authorized to represent him, and then the acts of the agent done in affirmance or part performance of the contract after such holding out must be taken to be the acts of the principal, so that he thereby becomes bound to the third party on the contract, as if he had himself acted on it. In such a case the party so becoming liable might not lose his right to complain of his agent having exceeded his actual authority. He would merely be bound to the third party by means of his having permitted the agent so to act with ostensible authority.

Now let us see what took place in the present case. It seems that the directors, after entering into the contracts in question, were advised that the company was not bound by them, owing to their being ultra vires, but that the 26,000*l.* paid upon the contracts could not be recovered back. In this view of the case, a simple repudiation of the contracts would have involved a loss of 26,000*l.* Doubtless for the purpose of avoiding this loss, a scheme was set on foot for transferring the contracts to a new company to be formed for the purpose. Prospectuses of this proposed company,

with an accompanying circular letter, were circulated by the directors amongst the shareholders of the defendant company. Then a balance sheet was circulated showing advances to have been made on account of these contracts. I quite agree that this balance sheet contains nothing which necessarily disclosed to the shareholders that the advances had been made in respect of ultra vires contracts, and if this balance sheet were the only evidence of knowledge on the part of the shareholders, it would be difficult to say that knowledge could be inferred.

As regards the shareholders who attended the meeting of the 5th of December, 1865, however, it is not all. It seems that at that meeting the Belgian contracts were the subject of strong observations, and that the directors, being under the impression that the new Antwerp, &c., Company would take over the contracts, led the meeting to believe that the item would not appear in the accounts again; that the meeting was satisfied with this explanation, and voted a dividend upon the assumption that the 26,000*l.* was an available asset of its full nominal value. That dividend was afterwards received by all the shareholders. Now remembering that these statements come from documents of the defendant company, and that no explanation has been offered by them as to their contents, it is difficult to avoid drawing the inference that what passed at that meeting was this: that objection was taken to these contracts on the ground of their not being legitimately within the scope of the company's business; that this fact was therefore then communicated to all the shareholders present, even if they did not know it before; that the scheme of forming a new company (of which the shareholders had already been advised by circular) for the very object of taking over these contracts, was also known; and that the shareholders present sanctioned the course proposed by the directors, of endeavouring to get the new company to take the contracts, and in the meanwhile of continuing to act upon them. Now it may well be, as suggested by the counsel who advised the committee of investigation, that the course taken at this meeting would not have the effect of absolving the directors from liability for misappropriating the moneys of the company. I think, however, that so far as the shareholders present at that meeting are concerned, their sanction

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

to the directors to transfer the contracts clearly amounts to an adoption of them as between themselves and the plaintiff. Transferring the contracts to others presupposes an election to take them in the first instance themselves, and not to treat them as wholly void or invalid. The shareholders were not entitled to try their chance of getting a favourable price for these contracts, and then, after having failed to do so, to turn round and repudiate them as wholly invalid.

If, therefore, the shareholders present at this meeting were authorized to bind the company by adopting these contracts, I should have no doubt but they had done so. It is, however, clear that they could not do so. The meeting was only authorized to bind the absent shareholders in matters relating to the business of the company, and in its capacity of a general meeting of the company could no more bind the absent shareholders by undertaking new business than the directors could. In order to bind the defendant company it is necessary that every member of the company should, with knowledge of the excess of authority on the part of the directors, have so conducted himself as to entitle the plaintiff to assume that he assented to what was being done.

If, however, any member, knowing what was going on, chose to absent himself from the meeting, and to leave it to the more active members to decide what was the best course to take, he is, in my judgment, as much bound by their action or inaction as if he had attended the meeting himself. Neither is it, in my judgment, incumbent on the plaintiff to shew by particular evidence knowledge on the part of every individual shareholder. If he shews general knowledge amongst the shareholders, he makes a primâ facie case, and throws upon the defendants the burden of shewing that there were any shareholders who did not know. In the *Phosphate of Lime Co.* v. *Green* (1), all the judges noticed the fact that no shareholder was called to say that he did not know. I agree with their remarks as to the importance of that, and think they are applicable to the present case. Here no explanation whatever is given on the part of the defendants. We are told there are few shareholders in the company, and we are not even

(1) Law Rep. 7 C. P. 43.

told that there were any shareholders in the company on the 5th of December, 1865, who did not attend the meeting. If it were necessary I should, of course, draw the inference that there were other shareholders; but, the matter being left entirely to inference, I arrive at the conclusion, in the absence of any evidence to the contrary on the part of the defendants, that the shareholders generally were informed of all that the meeting was informed of. The statement as to the prospectus and circular letter relating to the Antwerp company seems to me important. It is true that the gentlemen advising the company did not think that these communications so fully disclosed the state of affairs, especially as regards the personal liability of the directors, as to make the conduct of the meeting amount to an absolution of the conduct of the directors. Neither do I think it did. The view I take of all the facts is this: that the shareholders generally were aware that contracts had been entered into not within the scope of the company's business, and that the directors proposed to get out of the difficulty, not by at once repudiating the contracts and informing the parties to them that they were void, but by continuing to act upon them as valid until they could transfer them to another company, which they proposed to do as soon as possible; that the shareholders were content to look to the directors for their indemnification in case of loss, leaving them to take what they considered the best course of getting out of the difficulty.

By this course of conduct the shareholders, in my opinion, permitted the directors to hold themselves out to the plaintiff as authorized to bind the company, and thereby they conferred upon the directors what is sometimes called an implied authority, but more accurately an ostensible authority, to bind the company. The directors did undoubtedly so act upon the contracts as to affirm them and make them binding if their acts could do so; and thereby, as it seems to me, the company became bound.

It may be said that the principle of ostensible authority cannot apply, because the plaintiff must be taken to know the limitation of the directors' actual authority. That reasoning, however, is not, I think, sound; because, when the proposition is once established, as it clearly is by the cases, that an ultra vires contract may be adopted and made binding on a company in its corporate capacity

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

by the individual assent of all the members, it follows that the plaintiff must be taken to know that the limit of the directors' authority may be removed by such assent, and a more extended authority be conferred upon them. In cases, therefore, where the individual members of a company assent to the directors assuming a larger authority than that conferred upon them by the original constitution of the company, a person dealing with the directors is entitled to say that the company is bound by acts done within the larger authority. I am, therefore, of opinion that our judgment should be for the plaintiff.

BRAMWELL, B. I am very clearly of opinion that the contracts of the 30th of January, 1865, and of the 14th of October, 1865, were ultra vires of the defendant company's directors. The substance of these contracts was this: Gillon and Baertsoen had obtained the right to make a railway in Belgium. This right the defendants' directors supposed to be valuable to its owners, that is to say, the line could be constructed for a certain sum, and a société anonyme could be constituted, with shareholders to take its shares to an amount which would give a large sum over the cost of construction. The benefit of this the directors desired to obtain for the defendant company, and, to do so, purchased the concession. This was their main object. But the plaintiff held a contract with the concessionaires to construct the line; and to accomplish the directors' object it was necessary or desirable, or they thought it was, that they should agree with the plaintiff that the defendants should constitute a société anonyme; and, as the plaintiff went on with the work, the defendants should pay into the hands of the société proportionate funds. The further contract entered into in the defendants' name, called D., is of no importance to this case. The directors accordingly entered into two contracts in the defendants' name; one with the concessionaires to purchase the concession, the other with the plaintiff to furnish the société anonyme with funds; the latter contract being auxiliary to the former. They paid the concessionaires 26,000*l.*, part of the price. Now whatever may be the meaning of "carrying on the business of mechanical engineers and general contractors," to my mind it clearly does not include the making of either of these contracts.

It could only be held to do so by holding that the words "general contractors" authorized generally the making of any contract, and this they certainly do not.

Then it was said that by clause 4 of the articles of association an extension of the defendants' business may take place in pursuance of a special resolution; that, therefore, the directors had a conditional power to enter into any contract; and that the plaintiff was not bound to inquire into the internal proceedings of the company, and that, if necessary, it was to be assumed, or presumed, that such special resolution had been passed. Ably as this was put, I am of opinion it is untenable. The special resolution is not an internal proceeding. It must be registered equally with the memorandum of association. It, in effect, becomes part of it, and must as much be noticed by persons dealing with the company. If none is registered, that is notice to every one that none exists, if indeed there is none. There is no more a presumption to be made that it exists than it is to be presumed that articles of association exist different to those registered. So far I am glad to think I agree with my Brother Channell.

I think, therefore, the question is reduced to this, was the contract with the plaintiff ratified? If it was, it was between the 5th of December, 1865, and May, 1866. On this the facts are as follows:—In November, 1865, a balance sheet was sent to the shareholders. That shewed to all who received it that there had been advances on contracts, Madrid, Placentia, and Malpartida Railway, 41,338*l.* 11*s.* 10*d.*: Anvers, Douai, and Tournai Railway, 27,191*l.* 14*s.* 8*d.*; those sums were treated as assets of the company. The 27,191*l.* 14*s.* 8*d.* was the 26,000*l.* paid to the concessionaires and interest. In truth, that sum was not an asset; it never was to come back to the defendants. The true asset was the concession purchased; its value should have appeared on that side, and the obligations on account of it on the other. I am imputing no fraud; it might be a convenient way of stating the account. But it certainly did not disclose the truth, and though it might put a cautious shareholder on inquiry, it certainly did not shew an ultra vires contract; for there might have been a contract intra vires on which advances to that amount might have been made. But at the meeting, we must take it, the truth appeared.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

Possibly only so much as was necessary to explain those items, viz. that the concessionaires had been paid 26,000*l.*, whatever may be the explanation of the other item. But I think, and as a juryman find in favour of the plaintiff, that the meeting was told not only of that, but of the contract with the plaintiff. Then what did the meeting? They objected to what had been done. They objected to the contract of purchase. They objected to their money having been so laid out, and we must take it they objected to further outlay, viz. to further payments to the concessionaires, and, if they knew of it, to further, indeed to any, payments to the société anonyme, for I believe none had been made under the contract with the plaintiff.

But the directors seemed to think that the Antwerp, &c. Contract Company would take over the Belgian contract; and the chairman gave the meeting to expect that it would not again appear in the account, that is to say, that instead of that item appearing as an asset, or instead of its appearing that the company were owners of the concession as an asset, and liable on the purchase of it for its price per contra, the transaction would disappear from the accounts, and either the accounts would shew 27,191*l.* 14*s.* 8*d.* more cash, or some other asset purchased therewith. And so the meeting did nothing, but approved and adopted the accounts. Now this approving and adopting the accounts is only a recognition that they are accurately stated, and on correct principles; for example, that the figures are right, and that it is right to take the debts owing at a certain amount, making no, or no greater, deduction than made, if any, for bad debts. But it is no approval of the transactions shewn in the accounts.

Now when the facts were disclosed at the meeting, the shareholders had a right to object to the contract purchasing the concession, and to the defendants being bound by it, to require that no further outlay should take place on it, and that the directors should at once replace the 27,191*l.* 14*s.* 8*d.* The shareholders did not insist that the directors should replace the 27,191*l.* 14*s.* 8*d.* at once, they let that stand over, reserving their claim on the directors. This is manifest, for afterwards, when called on, the directors admitted their liability, and never pretended that their accounts had been approved or ratified at that meeting. But though the

shareholders did not insist on the immediate replacement of the 27,191*l.* 14*s.* 8*d.*, it is obvious, as I have said, that they did object to the contract purchasing the concession, and to the defendants being bound by it, and did object to further outlay on it. For if they did not do so, if they in any way ratified the contract, how could they afterwards call on the directors to replace the 27,191*l.* 14*s.* 8*d.*? Yet what took place on this occasion, which was a refusal to recognise the purchase of the concession, is nevertheless said to be a ratification of it, and of the contract with the plaintiff now sued on. For there is no other ratification. The stipulated moneys indeed, until May, were paid into the société anonyme, but by the directors, not by the company. This is in effect stated, and appears in this way, that no such payments appear in the defendants' accounts. Then McCandlish, the engineer, continued to act; but he was appointed by the directors, and should have been removed by them. So, also, the secretary wrote, declining, on behalf of the company, to purchase the Douai concession if obtained. No doubt speaking as though the bargain was binding; but he also was acting by order of the directors and not of the company. In short, what was done after the meeting of the 5th of December was done by the directors, not by, nor by the authority of, the defendants, the company, or the shareholders, and if done in the company's name was as much ultra vires as the original contract.

It occurred to me that there might be a duty in the shareholders to warn the parties to the contracts which they repudiated that they did so repudiate, and that their not doing so was a standing by which estopped them. But that is not so. It might be safe, prudent, and benevolent to do so, but it cannot be a legal duty. If A. and B. are partners as hatters, and A. buys wine as for the firm, deliverable at a future time, and pays partly on account out of the partnership funds, B., on discovering it, is entitled to require the money to be replaced, and that no further partnership funds shall be applied in that way; and he would do well to inform the seller of the wine. But he is not bound to do so any more than though he had never heard of A. before A. pledged their joint names. A. is bound at once to tell the seller of B.'s repudiation of the contract, and if he does not, commits a further

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

fraud on him, as did the directors here if they continued to represent to the plaintiff that they had authority to make these contracts. I cannot see in these facts any holding out or permitting the belief in the existence of a state of things, precluding them from denying they are parties to this contract. The utmost they authorized was a transfer to a purchaser of the concession. No payment to the plaintiff was authorized by or in the name of the company.

But it is argued in the clear and forcible judgment of my Brother Channell, that the shareholders, by permitting the directors to act as they would have to act in transferring the concession to the Antwerp Company, allowed the directors to hold out the defendant company as owners of the concession. But supposing that to be so, a person is only bound by a holding out where the person to whom that holding out has been made has acted on the supposed state of things so held out. But in this case nothing would be held out till the transfer of the concession took place, and at that moment the defendants would hold out, perhaps that they had been, but at that moment ceased to be, owners of the concession. But then on this the plaintiff never could and never did act. Suppose that the shareholders had passed a resolution that when the directors found a purchaser for the concession, the defendant company would execute a conveyance of it, how would that be any holding out, or the authorizing of any holding out, to the plaintiff or any one else of anything contrary to the true state of facts? Yet what took place at the meeting of shareholders is not more than this, nor so much. Further, there is no evidence of the plaintiff acting upon any such supposed holding out.

But, suppose there was a ratification of the contract for the purchase of the concession, either actually, or by holding out, or authorizing the holding out, that the company were its owners, and suppose the contract with the plaintiff was known to the shareholders at the meeting of the 5th of December, what is there to shew a ratification of the contract with the plaintiff to finance or pay money to the société anonyme? Absolutely nothing. It does not follow as a consequence of ratifying the contract with the concessionaires. The benefit of the purchase might have been obtained, though the contract with the plaintiff was repudiated.

For if the public had taken to the shares and paid up the appointed capital, the société anonyme could have paid the plaintiff, and the line would have been made, and so the profit of the purchase of the concession obtained. On these considerations there seems to me no ratification by the shareholders at that meeting followed by the subsequent matters.

But, assuming that the shareholders there as far as in them lay ratified the contract, how are the other shareholders bound? To bind the company all the shareholders must be bound; all must ratify. If A. and B. are partners, B.'s ratification is necessary to a contract ultra vires of A.; and would be if the partnership consisted of A. and B. and fifty others, and the other fifty ratified, but B. refused. See per Lord Cranworth in *Spackman* v. *Evans*. (1) What evidence is there here that the shareholders not present at the meeting ratified the contract with the plaintiff? To my mind none. I quite agree with the authorities cited. I should be bound by them if I did not; but I do. Compare, however, this case with the words of my late Brother Willes, in *Phosphate of Lime Company* v. *Green*. (2) That was indeed a case in which the only question was, was there evidence to support a verdict? But he laid down a rule by which I am content to be governed. He said, "The principle by which a person on whose behalf an act is done without his authority may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition; in order to make it binding, it must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances." I agree. Can it be said here that the shareholders have ratified the contracts, including that with the plaintiff, with full knowledge of the character of the act to be adopted? Assume the shareholders at the meeting of the 5th of December knew of the contract with the plaintiff. Assume they ratified it. How is the full or any knowledge of the absent shareholders shewn? It is clear there were other shareholders than those present. How does any ratification by them appear? Assuming the balance sheets were calculated to put them upon inquiry, which would have led to knowledge, how does it appear there were such

(1) Law Rep. 3 H. L. C. at p. 191. (2) Law Rep. 7 C. P. 43, at p. 56.

1874

RICHE v. ASH BURY RAILWAY CARRIAGE CO.

inquiries? If I am to find this a fact I refuse to do so, as I do not believe it. No one really believes it. If there was not a ratification and adoption with such full knowledge of the act to be adopted, where is the evidence of the adoption, "with intention to adopt it at all events and under whatever circumstances," either by the shareholders at large, or even by those at the meeting? To my mind there is neither evidence of any such adoption, or of any such intention. As to the facts of that case Mr. Justice Willes' review of the facts from the above sentence to the end of the paragraph at p. 59 should be read. It seems that the transaction objected to was nearly four years old when objected to, and that for three years the shareholders had been receiving dividends on the footing of it. He says, and I agree, it would be a waste of time to refer to authorities to shew that one who chooses to adopt the benefit of a transaction ought to be bound by it. I rely also on the other judgments in that case. Keating and Brett, JJ., both refer to dividends having been received on the footing of the transaction. So, also, I rely on the opinion of Lord Cairns, so felicitously expressed in *Evans* v. *Smallcombe*. (1) He says, "My Lords, in my opinion lapse of time alone certainly would not make valid that which at the beginning was invalid; and if in this case the defence of Mr. Smallcombe were to rest merely upon the lapse of time, I apprehend that defence would fail. But your Lordships have to consider not merely the question of lapse of time; you have to consider what was the knowledge possessed by the company at large, that is to say, by the shareholders in the company at large, of the Chippenham arrangement, and what was the knowledge possessed by the company of what was being done under the Chippenham arrangement." And afterwards, at p. 256, "My Lords, I only desire to add one word with regard to a phrase which I think, in matters of this kind, is sometimes somewhat misapplied, namely, the phrase 'acquiescence.' If by 'acquiescence' is meant a course of conduct which amounts to active and intelligent consent, I think it very likely that many of those shareholders could not be held to have actively or intelligently consented to what was going on. But what I think is the real question to be looked at in any case of this kind is this: had the

(1) Law Rep. 3 H. L. C. at p. 253.

shareholders notice of the way in which the affairs of the company were being conducted, and its property was being managed, and of the rights and interests which were being created with regard to the stock of the company? If they had that notice, and if they were content not to oppose those acts which they knew were every day being done, then I think they are debarred in point of equity from coming forward at a later period for the purpose of undoing the rights and releases which had been created and given, although it might well be that any remedy to which they would originally have been entitled against the executive of the company for any breach of duty on their part might be unaffected even by lapse of time." Had the shareholders in this company notice of the way in which its affairs were being conducted? Were they content not to oppose those acts which they knew were every day being done? So Lord Cranworth, at p. 258: "I think it was obvious from the balance sheets, and so that the absent shareholders must have known, that the directors had gone on acting on the assumption that they were at liberty to allow shareholders to retire on the terms indicated in the circular of the 2nd of November, 1848, even after the time originally contemplated had been suffered to pass."

As I said before, if, to decide for the plaintiff, I am to find a ratification, either of the contract for the concession or of that with the plaintiff, and either by the shareholders at the meeting or by the whole body, I cannot so decide. I do not believe, I am satisfied no such thing was intended, and I see no reason for holding, there has been any negligence, standing by, acquiescence and quiescence in the shareholders to bind them. As to the argument that the non-attending shareholders make those who attend their agents to consent and ratify, I cannot agree with it. I can see no duty in the absent shareholders to attend; no fault to find with their absence. There is some ground for such a contention where the ultra vires objection appears on the accounts and reports, but none, as it seems to me, where it does not so appear.

I cannot help saying that though this particular defence may be unbecoming, if the directors are the real defendants, it is one of a character which should be entertained without prejudice. If A. and B. are partners, and A. enters into a contract in their name

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

without authority to bind B., I cannot see why B. may not in all honour and honesty object to be bound, though his objection may enure for the benefit of A. One or two innocent persons have been injured by A.; why should the partner bear the loss? Suppose they were not partners at all, the case is the same in principle. And so is the case of a joint stock company, where the shareholders and the legislature do their best to restrict the powers of the directors, yet where it is always urged that it is dishonest of them not to acquiesce in any excess of authority. I concur in the opinion of Lord Cranworth in *Houldsworth* v. *Evans* (1), who says, "That it is a most essential proposition, to be rigidly enforced, that in these joint stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty, unless in cases where they are informed that, although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do." And as to this particular case, it is quite possible that the directors did not know their want of authority, and that the plaintiff, though a foreigner, knew as much or as little about it as the directors did, and that the latter are only seeking to avoid bearing the whole loss of a common mistake. In my opinion the defendants are entitled to judgment.

MARTIN, B. The plaintiff is the surviving partner of a firm of railway contractors at Brussels. The defendants are the Ashbury Railway Carriage and Iron Company (Limited), incorporated under the Companies Act, 1872. The action is to recover damages for breach of a contract, dated the 30th of January, 1865, supplemented by another contract, dated the 14th of October, 1865, and the only question to be decided by us is, whether the company are liable to be sued upon these contracts.

The circumstances are these: In March, 1864, the Belgian government had granted to Messrs. Gillon, of Brussels, a concession for making a railway from Antwerp to Tournai, which was expected to be continued to Douai, in France. 4000*l.* was deposited in part-deposit of caution-money, and 16,000*l.* more was to be deposited upon the concession being made absolute, which

(1) Law Rep. 3 H. L. C. at p. 276.

was done on the 3rd of February, 1865. In January, 1865, Mr. James Ashbury, the assistant managing director of the defendants, was sent by the directors to Brussels to carry out a negotiation, as the agent of the defendants, with respect to the concession, and was provided by the directors with 26,000*l.* for the purpose. The result was that he purchased the concession from Messrs. Gillon for 26,000*l.*, and entered into the contract first above mentioned with the plaintiff's firm, who had previously made a contract with Messrs. Gillon, as sub-contractors, to make the railway. In order to carry out the transaction four contracts were entered into by Mr. James Ashbury, all dated the 30th of January, 1865, but it does not seem to me necessary to encumber the judgment with entering into their minute details, as they appear to have been in part made in order to comply with the law of Belgium; and it is sufficient to state that the defendants were declared to be purchasers and assignees of the concession, and, by the contract of the 30th of January with the plaintiff's firm (who undertook to make the line), the defendants contracted to provide them with the necessary cash for the carrying out of the undertaking.

In July, August, and September, 1865, the plaintiff's firm made the necessary plans and surveys for constructing the line, and on the 14th of October, 1865, Mr. McCandlish was accredited by the directors to the plaintiff's firm as the engineer with whom they were to arrange all details, and by whom the plans were to be approved. In October, 1865, the directors sent over Sir Cusack Roney, and Mr. Tahourdin, their solicitor, to Brussels to make final arrangements in relation to the contracts, and Sir Cusack Roney, being duly authorized by the directors to act as the agent of the defendants, upon the 14th of October entered into three supplemental contracts. It also seems to me not necessary to refer more particularly to these contracts, and that it is sufficient to state that by agreement with the plaintiff's firm the defendants were to pay into a company called the société anonyme (which company by the law of Belgium was necessary to carry out the transaction) 15,000,000 francs in such manner that the plaintiff's firm should always receive from the société anonyme an amount of 15,316 francs in cash upon a certificate of the engineer that 32,760 francs were earned, and so on in the same ratio. The plaintiff's firm proceeded

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

to construct the line, and entered into several contracts with other persons for the purpose. They sent to the société anonyme pay-sheets approved and countersigned by Mr. McCandlish, and the proper proportion of each pay-sheet was paid in cash to the société anonyme by the directors in the names of the defendants, in accordance with the provisions of the contracts, and was by them paid to the plaintiff's firm. This continued until May, 1866, when the directors gave notice to the plaintiff that they repudiated all further performance of the contracts on the ground that they were "ultra vires." In consequence this action was brought.

By the memorandum and articles of association the company was established "to make and sell, or lease on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell as merchants timber, coal, metals, and other material, and to buy and sell any such material on commission or as agents." And by article 4 of the articles of association "an extension of the company's business beyond or for any other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." It was argued on behalf of the defendants that the purchase of the concession of the Antwerp, Tournai, and Douai Railway was not an object within the scope of the memorandum of association, and that there was no special resolution authorizing it, and that, if this were so, the contract with the plaintiff's firm did not bind the defendants. The contrary was contended for on behalf of the plaintiff; but with the view I take of the case it is not necessary to give an opinion upon this point; for, assuming the contracts not to have been binding upon the defendants ab initio, I think they have ratified and are bound by them.

The authorities hereafter mentioned, both at law and in equity, establish that the shareholders in a joint stock company may ratify a contract made by the directors, although such contract was ultra vires, or beyond the authority of the directors to make; and in my opinion, if the evidence shews that in December, 1865, the company, by which I mean the body of shareholders other than

the directors, had notice of these contracts, and that the plaintiff's firm were actually engaged in making the railway, and expending their labour and capital upon it, sending in certificates from week to week, and receiving payment of half the amount of their certified debt; and the company for nearly five months, i.e., from December to May (during all which time the work was going on), forbore from giving notice to the plaintiff's firm that they would not take to the contracts, but stood by with the knowledge that the plaintiff's firm were acting under the belief that they were the contracting parties, in my opinion the company are bound and are liable to be sued upon the contracts.

The law upon the subject is clear and well established, both in courts of law and equity. There is no older rule of law than that if a contract be made on behalf of a man who has given no authority to make it, but who afterwards adopts and ratifies it, he is bound by it. The rule is a maxim to be found in Co. Litt. "Omnis ratihabitio retrotrahitur, et mandato equiparatur." Co. Litt. 207 a. This rule has been applied to joint stock companies. It was agreed to be the law in *Spackman* v. *Evans* (1), and although the majority of their Lordships were then of opinion that a ratification was not proved in point of fact, all concurred as to the law. Lord St. Leonards and Lord Romilly differed from the majority, and Lord St. Leonards said that in his opinion it was enough to shew that the shareholders had the means of knowledge, and that if means of knowledge existed, notice ought to be imputed. Lord Cairns said that the question was, had the shareholders notice of the way in which the affairs of the company were being conducted and its property managed, and of the rights and interests which were being created with regard to the stock of the company? if they had that notice, and did not oppose these acts, they were bound. There are other cases in equity to the same effect. In the case of *Phosphate of Lime Co.* v. *Green* (2) the same principle was upheld. Mr. Justice Willes fully adopted it. Mr. Justice Brett, in reference to the objection that all the shareholders were not proved to be parties to the alleged ratification, said (at p. 63): "It is impossible to prove that every shareholder had notice, or such a knowledge of the facts as amounts to notice. It is

(1) Law Rep. 3 H. L. C. 171. (2) Law Rep. 7 C. P. 43.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

sufficient to shew that facts were made known to the shareholders, the effect of which they might or ought to have inquired into, and to which they ought to have objected at the time, unless they intended to adopt the transaction."

This is in my opinion a sound exposition of the law, and the question is, whether on the 5th of December, 1865, the shareholders of the company (other than the directors) had not notice of the contracts with the plaintiff's firm, and whether the shareholders not present, but who might and perhaps ought to have been present, must not have imputed to them such notice, and whether, by abstaining from giving any notice to the plaintiff or his firm that they objected to the contracts for so long a period as five months, they having knowledge, or means of knowledge, that the plaintiff or his firm were during this period actually performing their part of the contract by making the line under the superintendence of Mr. McCandlish, they are not estopped from denying their liability.

The question is one much more of fact for a jury than of law; and what we have to decide is, what would be the right verdict upon a right direction? The material facts are these:—The contract of the 30th of January, 1865, is made "between the limited liability company, the Ashbury Railway Carriage and Iron Company, of Manchester, represented by Mr. James Ashbury, their assistant managing director, of the one part, and Messrs. Riche Brothers, contractors of public works, residing at Brussels, of the other part."

The contract of the 14th of October is made "between the Ashbury Railway Carriage and Iron Company (Limited), having their seat at Manchester, represented here (Brussels) by Sir C. P. Roney, on the first hand, and Messrs. Riche Brothers, contractors of public works, resident at Brussels, on the other hand." The contracts are therefore in express words made by the company, the defendants.

The next fact is, then, the annual general meeting of the company was held on the 5th of December, 1865, and on the 27th of November a notice of it was sent to all the shareholders, in which was contained the following clause: "The meeting will also be required to declare a dividend payable out of the balance as shewn

in the balance-sheet sent herewith." The balance-sheet on the credit side, headed "Property and Assets," contains the following, amongst other items: "Advances on contracts, Madrid, Placentia, and Malpartida Railway, 41,338*l.* 11*s.* 10*d.*; Anvers, Douai, and Tournai Railway, 27,191*l.* 14*s.* 8*d.*" The sum of 27,191*l.* 14*s.* 8*d.* is the 26,000*l.* with which Mr. James Ashbury was furnished to buy, and with which he bought, the concession from Messrs. Gillon, and interest upon it. At this general meeting, a report of the directors was read, recommending a dividend equal to near 14*l.* per cent. per annum, and the secretary read the balance-sheet, which is stated to be and is certified by David Chadwick, the auditor. Whereupon it was moved, and seconded, and resolved unanimously, "that the report and accounts now read be approved and adopted."

Now, assuming that this was the only evidence in the case, what would it prove? It would prove that the body of shareholders were made acquainted, on the 27th of November, with the fact that a sum of money had been advanced on a contract in respect of the Anvers, Tournai, and Douai Railway, amounting to many thousand pounds; and that on the 5th of December, at a general meeting, they had approved and adopted the account which contained and included it, they having had notice of it for upwards of a week before, and voted a dividend of 14*l.* per cent. to themselves upon the footing of the general account. Now, if they approved and adopted the payment of 26,000*l.* to Messrs. Gillon, being the purchase-money of the concession, they of necessity must have approved of and adopted the purchase; and if they did so, they must, as it seems to me, also have approved and adopted the contract with the plaintiff's firm, which was part and parcel of the same transaction.

It is not necessary to allude to what further inferences might be reasonably drawn from the resolution of the general meeting of the 5th of December, 1865, as much light is thrown upon the matter by what occurred consequent upon two extraordinary meetings of the company, one held upon the 20th of December, 1866, and another upon the 1st of May, 1867. At the meeting of the 20th of December, 1866, a committee was appointed to inquire into the proceedings of the company, and to report; and at the meet-

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

ing of the 1st of May, 1867, the committee made their report. From this it appears that, so early as February, 1865, Mr. James Ashbury made a written report to the directors of the Belgian contracts, and "that the original contract with the plaintiff's firm was ordered to be registered and preserved at the office of the company." It also appears from the report that the Belgian contract was made the subject of strong observations at the meeting of December, 1865, and that, in consequence of what the chairman said, the meeting was given reason to expect the item of 27,191*l.* 14*s.* 8*d.* (the Antwerp and Tournai item) would not appear in the account again. From this evidence I draw the conclusion, first, that the shareholders knew of the purchase of the concession from Messrs. Gillon; secondly, that they knew of the contract with the plaintiff's firm which was registered at the office; and, thirdly, that they knew of Mr. McCandlish having been sent over to Belgium, and that the plaintiff's firm were actually engaged and occupied in the making of the line; and I am as satisfied as I can be of anything, that a jury would come to the same conclusion from the same evidence. Suppose the plaintiff to have brought an action for work and labour done during the period between the 5th of December, 1865, and May, 1866, during which time the defendants knew that the plaintiff was under the belief that he was doing the work upon their credit, but during which time they abstained from communicating to him that they dissented from the contract, in my opinion the case would be what is called an undefended cause. In more than one of the cases before cited, much stress was laid upon the circumstance that no shareholder was called to prove that he did not know of the disputed contract. In the present case there are not very many shareholders, and not one was called to prove that he did not know all that occurred at the general meeting on the 5th of December, 1865. I have only to add that if I were on a jury, upon the evidence in this case, I would find a verdict for the plaintiff, upon the ground that it was the duty of a shareholder who, on the 5th of December, 1865, desired to dissent from and put an end to the contract with the plaintiff, to communicate such dissent to him, and stop the expenditure of his labour and capital upon the making of the line.

The directors and the other shareholders continued for some time to dispute with each other over the Belgian and Spanish contracts, and the result was, that by a deed of the 24th of December, 1867, the matter was arranged, the directors becoming the purchasers of the interest of the company in the two lines, the Spanish and the Belgian, and agreeing to pay 27,705*l.* 0*s.* 3*d.* for the estate and interest which the defendants had in them. There is a covenant in this deed that the directors shall indemnify the defendants against the obligations of every description which had been entered into by the Ashbury Company, or any of its directors or agents, in respect of these contracts, so that in the event of the defendants being compelled to pay damages, they will be entitled to be recouped by the directors.

That the directors would be liable upon the contracts sued on there can be no doubt; and it does seem extraordinary, they being solvent and affluent men, that they should not have taken upon themselves the defence to this action upon its merits, if there be any, and prevented the appearance at least of what seems to me an unjust repudiation.

Judgment for the plaintiff.

The defendants brought error.

June 21, 22, 23, 25. *Watkin Williams, Q.C.* (with him *Sir J. B. Karslake, Q.C.*, and *Cohen, Q.C.*), for the defendants. First, the contracts were ultra vires, being beyond the scope of the memorandum of association, and therefore did not originally bind the company.

[THE COURT intimated that he might for the present assume them to be so.]

Secondly, if they were ultra vires as being beyond the scope of the memorandum, they were incapable of ratification. By s. 8 of the Companies Act, 1862, the memorandum of association of a company limited by shares is to contain "(3.) the objects for which the proposed company is to be established;" and by s. 12, "any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned (s. 50), as to increase

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock; but, save as aforesaid, and save as is hereinafter provided in the case of a change of name (s. 13) no alteration shall be made by any company in the conditions contained in its memorandum of association." (1) The effect of the 8th and 12th sections is, that all acts beyond the scope of the memorandum are impliedly prohibited; and although all the shareholders of the company were to consent to such a contract, and the seal of the company were affixed, the company would not be bound; for the seal only binds the company when it is duly and legally affixed: *D'Arcy* v. *Tamar, &c., Ry. Co.* (2); Lindley on Partnership, vol. 1, pp. 251, 262 (1873). But the power of a company to ratify a contract can be no greater than their power to make it. Ratification is nothing but the making of a contract where none existed before, although, when made, its effects are retrospective; and the prohibition to do the one includes the prohibition to do the other also. And the reason of the prohibition applies equally to both. The memorandum is that which intending shareholders and the public which deals with the company rely on as describing the nature of the company and the scope of their business; and they are equally deceived, whether the ultra vires contract was originally made or was afterwards adopted by the individual shareholders. But no such argument applies to acts which are within the memorandum, and are only ultra vires because the company have not complied with the provisions of their articles of association. Those acts they had power to do; their invalidity was only due to the want of a preliminary required by the internal regulations of the company, and which the company might have performed; and when such an act is validated by acquiescence, all that happens is that the shareholders agree to dispense with rules which they have established for the conduct of their own business. On the

(1) 30 & 31 Vict. c. 131 (passed after the date of the transactions in question) allows of other changes being made, as, to render the liability of directors or managers unlimited (s. 8), to reduce the capital of the company (ss. 9–20), and to subdivide its shares (ss. 21, 22).

(2) Law Rep. 2 Ex. 158.

contrary, the invalidity of an act which is beyond the scope of the memorandum does not depend on the want of any such preliminary; for there is no process by which the company could have rendered themselves competent to do it. Again, with reference to acts invalid only for want of compliance with the internal regulations of the company, no one is deceived by their being ratified; on the contrary, it was in the power of the company to take the proper course, and those who deal with them are entitled to assume that it will be or has been taken; the deception consists in not taking it, and the ratification only cures the effect of the deception.

It is with respect to acts of the latter kind only that the cases have decided that they can be rendered effectual by the assent of all the shareholders. [In addition to the cases cited in the judgment, he referred to *Imperial Bank of China* v. *Bank of Hindustan* (1); *Re Phœnix Life Assurance Co.* (2); *Macgregor* v. *Dover and Deal Ry. Co.* (3); *Attorney General* v. *Compton.* (4)]

Thirdly, assuming the defendants had power to ratify the contract, they have not done so in fact. It can only be done by the assent of all the shareholders, and there are no facts from which such assent can be inferred. Neither if the assent of all to what was done at the meeting of the company were proved is there any ratification, because they have throughout repudiated this liability, and by the deed of the 24th of December, 1867, they only undertook to give the so-called purchasers such advantages as they could give without accepting the liability of the contracts, which they at the same time expressly disclaimed.

Fourthly, the alleged ratification was never communicated to the plaintiff, and cannot undo the previous repudiation.

Benjamin, Q.C. (with him *W. G. Harrison*), for the plaintiff. First, the contracts were within the scope of the words in the memorandum, "to carry on the business of mechanical engineers and general contractors."

[THE COURT intimated that the words "general contractors"

(1) Law Rep. 6 Eq. 91.
(2) 2 J. & H. 229; 31 L. J. (Ch.) 749.
(3) 18 Q. B. 618; 22 L. J. (Q.B.) 69.
(4) 1 Y. & C. Ch. C. 417.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

must be read with the context, and could not include every sort of business usually undertaken by contractors.]

Secondly, the contracts nevertheless bound the company. It is not disputed that if, as in *Chambers* v. *Manchester and Milford Ry. Co.* (1), there were express words of prohibition, the contracts could not be enforced against the company. But it is admitted on the part of the defendants that there is no express prohibition, and no such prohibition can be implied from the 8th and 12th sections of the Companies Act, 1862. When those sections are read in conjunction with the 11th and 14th, it is plain they are not to be taken as making all acts beyond the scope of the memorandum absolutely illegal and void. The object of the memorandum, as well as of the articles of association (which is only required in the case of a company whose capital is limited by shares—s. 14), is the protection of the shareholders; and if all the shareholders consent to waive that protection, it is competent to them to do so. The case really depends not on the law relating to illegal contracts, but on the application of the doctrine of ultra vires. The true application of that doctrine is only between the shareholders and directors: *Prince of Wales Assurance Co.* v. *Harding* (2); *Taylor* v. *Chichester and Midhurst Ry. Co.* (3), per Willes and Blackburn, JJ.; *Ayers* v. *South Australian Banking Co.* (4) But if it has any application as against third persons, it only applies where they ought to have known, or had reason to believe, that the contracts were beyond the power of the directors to make. If they are such as might have been made, third persons contracting with the company are not bound to inquire whether all the preliminaries required by the constitution of the company have been performed; they are entitled to assume that they have been, and the Court will presume everything in their favour: *Royal British Bank* v. *Turquand* (5): *Agar* v. *Athenæum Life Assurance Co.* (6); *Prince of Wales Assurance Co.* v. *Harding* (2); *Totterdell* v. *Fareham Blue Brick Co.* (7); *Re*

(1) 5 B. & S. 588; 33 L. J. (Q. B.) 268. 10 Jur. N.S. 709.

(2) E. B. & E. 182; 27 L. J. (Q.B.) 297. 4 Jur. N.S. 851.

(3) Law Rep. 2 Ex. 356, at pp. 379, 389.

(4) Law Rep. 3 P. C. 548.

(5) 6 E. & B. 327; 25 L. J. (Q.B.) 317. 2 Jur. N.S. 863.

(6) 3 C. B. (N. S.) 725; 27 L. J. (C.P.) 95. 4 Jur. N.S. 211.

(7) Law Rep. 1 C. P. 674. 12 Jur.

Athenæum Life Assurance Co. (1); *Re British Provident Life and Fire Assurance Co., Grady's Case* (2); *Lane's Case* (3); *Fountaine* v. *Carmarthen Ry. Co.* (4) Now, in the present case, by the joint operation of the memorandum and the 4th clause of the articles of association, these were contracts which the company might have validly made if the necessary preliminaries had been complied with; as against third persons therefore they are bound by them.

Thirdly, if not originally binding, it was competent to all the shareholders to ratify them, and they have done so. That they could do so is established by *Evans* v. *Smallcombe* (5); that they have done so in fact is shewn by the reasoning in that case and in the cases of *Laird* v. *Birkenhead Ry. Co.* (6); *Crook* v. *Corporation of Seaford* (7); *Phosphate of Lime Co.* v. *Green.* (8) The shareholders must all be presumed to have received the balance sheets and the circulars announcing the meetings; and the state of the accounts, and the reference to disputes and to the report of the committee of investigation, contained in the circular calling the meeting of the 14th of May, 1867, were sufficient to put them on inquiry, and make it their duty to acquaint themselves with what was going on; and if with this notice they absented themselves from the meeting, they must be taken to have assented to whatever arrangement the meeting might sanction. That the ratification was not communicated to the plaintiff is of no consequence. Ratification gives the same effect to a contract as previous authority; if an agent has authority in fact, it makes no matter whether that fact has or has not been communicated by the principal to the other contracting party, and it is of equally little consequence, where the agent has acted without authority, whether the principal communicates the adoption of his agency; it is sufficient if he has taken the benefit of the contract: *Soames* v. *Spencer* (9); *Walter* v. *James* (10); *Ramazotti* v. *Bowring.* (11) Nor does it make any

(1) 4 K. & J. 549; 27 L. J. (Ch.) 829.
(2) 1 De G. J. & S. 488; 32 L. J. (Ch.) 326.
(3) 33 L. J. (Ch.) 84.
(4) Law Rep. 5 Eq. 316.
(5) Law Rep. 3 H. L. C. 249.
(6) 29 L. J. (Ch.) 218.
(7) Law Rep. 6 Ch. Ap. 551.
(8) Law Rep. 7 C. P. 43.
(9) 1 D. & R. 32.
(10) Law Rep. 6 Ex. 124.
(11) 7 C. B. (N.S.) 851; 29 L. J. (C. P.) 30.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

difference in this respect whether there has been a previous repudiation; *Bird* v. *Brown* (1) only shews that ratification cannot override previous transactions so as to make the act of a stranger wrongful, but there is no rule to prevent a person from cancelling his own act of repudiation by a subsequent ratification.

Fourthly, the company are estopped by the deed of December, 1867, from setting up this defence. They have agreed to allow the purchaser to use their name as plaintiffs or defendants; they are only nominal parties, the real defendants being the purchasers, from whom the company have taken such an indemnity as they deemed sufficient, and to set up the defence of ultra vires is a fraud on the plaintiff. It might be open to a shareholder to restrain the execution of the contract by the company, but the company are estopped from using this defence.

Watkin Williams, Q.C., in reply.

Cur. adv. vult.

June 20, 1874. The following judgments were delivered:—

BLACKBURN, J. (2) The Ashbury Company are a company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89). The memorandum of association states (as was required by the 8th section of the Act), the object for which the company is established. The articles of association (3) which it is material to notice are those numbered 3, 4, and 5.

Up to a certain extent I believe there is no doubt as to the effect of the incorporation of a company under the Companies Act of 1862. The company is a corporation, and it is a partnership for trading purposes, for the objects for which the company is established. And by the articles in this case, as in almost all others, the management of the company's business is confided

(1) 4 Ex. 786.

(2) Brett and Grove, JJ., concurred in this judgment.

(3) These articles were as follows:—"3. The company's business shall be conducted exclusively by or under the supervision of the directors or board according to these presents. 4. An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association, shall take place only in pursuance of a special resolution. 5. No person except the directors or a person from time to time expressly authorized by these presents or by a board so to do, shall have any authority to enter into any contract so as to bind the company thereby."

exclusively to a board of directors. And I apprehend that it is clear that this board have the same authority to bind the company in the managing the company's business that a partner or manager in an ordinary partnership, established at common law for the same objects, would have to bind the firm; an authority which to be valid must be exercised in cases within the scope of the ordinary business and transactions of the firm: see Story on Partnership, ss. 110, 111, 112, 113. If the board in a joint stock company, or a partner in a common law partnership, make a contract beyond their authority, it does not bind the company in the one case, or the firm in the other. This is only applying the general law as to principal and agent to the particular case of a board acting as agents for an incorporated company. So far I believe there is no difference of opinion.

But if a partner, in a firm established under the common law, professes to bind his firm to an extent beyond his authority, the other members of the firm, though not bound by his unauthorized contract, may adopt and ratify it, and if they do the firm is bound.

It is obvious that in many cases it may be judicious to adopt an unauthorized contract and make the best of it. In many others it may be injudicious so to do. On that each individual partner must form his own opinion. And as the partners do not confer on each other authority to ratify contracts which they did not give each other authority to make, the ratification, to bind the firm, must be shewn to be made by the authority of each individual partner. No majority of partners, however great, can bind the minority. If even one partner does not ratify, then, though all the rest agree, the firm is not bound. This again, is only applying the general law of agency to the particular case of a partner acting as agent for the firm.

The question on which there is doubt and difficulty is, whether in the case of a company incorporated under the Companies Act, 1862, the unanimous shareholders can ratify a contract made in the name of the company, but beyond the authority of those who made it. That question must ultimately depend on the true construction of the Act of Parliament. Had the legislature thought fit to enact in clear language either that all contracts, made by or on behalf of a company incorporated under the Act beyond the

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

scope of the objects for which it was established, should be absolutely void, or expressly to enact that contracts though beyond the scope of those objects should be valid if either previously authorized, or subsequently ratified by all the shareholders, our task would simply be to carry out that expressed intention of the legislature. But there is no express enactment either one way or the other in the Act of Parliament, and we must therefore interpret the Act for ourselves.

I will endeavour to do so later, but I now proceed to shew how, in fact, the question arises in the present case. The board entered into contracts called in the case contracts A, B, C, and D, and in October, 1865, entered into further contracts, called in the case X, Y, and Z, modifying those. If those seven contracts had been such that the board of directors had authority to make them on behalf of the company, the plaintiff would clearly be entitled to recover. But I think that, looking at those contracts as a whole, they are not within the scope of the objects for which the company was established, as disclosed in the memorandum of association. I do not enter on this part of the subject, as it is fully, and, to my mind, satisfactorily disposed of by Bramwell and Channell, BB., in their judgments below, and by my Brother Archibald in his judgment in this case, which I have perused, and I believe there is not any difference of opinion on that part of the case amongst the judges in the Court of Error.

I think, and start with the assumption, that the company was not in October, 1865, bound by those contracts, though entered into by the board in its name, on the ground that the board had exceeded its authority. But it is contended that the whole of the shareholders in the company have ratified the contracts. And whether or no that ratification is made out is a question of fact, which we have to decide on the statements in the case, with power to draw inferences.

I think we have much reason to complain of the way in which the case is stated on this point; and I have had some doubt whether we ought not to send down the case to be restated. But on the whole I think enough appears to lead me to find this fact in favour of the plaintiff.

It appears that the board of directors had advanced on the con-

tracts, and on some Spanish contracts of a similar kind, a large sum of money. In their balance sheet, dated the 30th of September, 1865, they take credit amongst other items for

"Advances on Contracts,

	£	s.	d.
Madrid, Placentia, and Malpartida Railway .	41,338	11	6
Anvers, Douai, and Tournai	27,191	14	8"

and this balance sheet was circulated amongst the shareholders. At the annual meeting, held on the 5th of December, 1865, a dividend of 14 per cent. was declared, and was, no doubt, accepted by every shareholder. Now, if I could see that the entry in the balance sheet, above quoted, should have conveyed to the mind of an ordinary shareholder that the board had entered into contracts ultra vires with the Belgian Railway, and that the large dividend declared was earned in part out of these unauthorized contracts, I should have no hesitation in drawing the conclusion that the acceptance of that dividend did amount to a ratification of those unauthorized contracts, whatever they might be.

But though the large item thus vaguely described might lead a good man of business to ask for explanation, I do not think it would convey to the mind of an ordinary shareholder any such information as to justify me in drawing the inference that each such shareholder adopted the transactions with the Belgian Railway, knowing them to be beyond the authority of the board.

Before the next annual meeting of the company times had changed. Instead of a flourishing report, and a dividend of 14 per cent., a circular was sent, informing the shareholders that the meeting would be held pro formâ, and adjourned to a day of which notice would be given. It was, in fact, ultimately held on the 14th of May, 1867. This circular was sent in consequence of a resolution passed at a special general meeting, held on the 20th of December, 1866, at which a committee was appointed to inquire, and report at an early meeting of the shareholders.

I draw the inference of fact that the circular was duly sent; and I further think that every shareholder who received such a circular must now have been aware that something was wrong, and has himself only to blame if after this he failed to learn what was the report of the committee of inquiry.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

That report was presented at an extraordinary meeting of the company, held on the 1st of May, 1867.

This report incidentally refers to negotiations between the board and some individuals, directors and shareholders, and to the circulation among the shareholders of a prospectus and circular letter. These are matters which might or might not be material if we knew what they were, which the case as drawn does not tell us. But this much is obvious to any one who reads the report, that the board had entered into contracts in Belgium which the committee were advised were beyond the authority of the board. That under those contracts a large sum belonging to the company had been advanced in Belgium which, as the committee were advised, could not be recovered back from the Belgians. That the committee thought the directors might be made personally liable in Chancery, and that proposals had been made for a compromise between the directors and the company on the basis of a transfer of the liability and advantage of these contracts.

And the committee wind up their report by saying that "looking at the important interests involved, and the extent to which they would be jeopardised by proceedings in Chancery extending over a considerable period, they would recommend the shareholders to endeavour to effect an amicable settlement with the directors without having recourse to legal proceedings."

At the meeting on the 1st of May, 1867, a committee was accordingly appointed "to confer with the directors with the view to an agreement being arrived at on the matters in dispute."

On the 14th of May, 1867, the general meeting adjourned pro formâ in December, 1866, was convened by a circular letter mentioning among the agenda:

7 H. L. 681

"To receive, consider, and, if so determined, to adopt any report or recommendation which may be made by the committee appointed at the extraordinary meeting held on the 1st of May instant to confer with the directors with a view to an agreement being arrived at on matters in dispute."

7 H. L. 681

The balance sheet which accompanied this circular shewed a loss, and the directors' report also accompanying it declared that there was no dividend. These are matters intelligible to, and likely to rouse attention in, the dullest and most careless of share-

holders. I certainly, therefore, feel justified in saying that there is a primâ facie case that every shareholder knew what it was proposed to do. I do not say that it is conclusive. A shareholder might have been dangerously ill during the whole of these six months, so as to be incapable of attending to business, and other exceptional cases might exist. But the defendants have a strong interest in proving that there was even one shareholder who did not know what was going to be considered, or who afterwards disapproved of what was actually done, and they have made no attempt to prove it.

At the meeting held on the 14th of May, 1867, a resolution was come to [see post, pp. 280–282].

The sale to the purchasers of the company's interest in the contracts does of necessity involve in it a ratification of those contracts, and if the purchasers were solvent persons, which, at all events, they were believed to be, it was very much for the interest of the company that such a sale should be made. I am, therefore, not surprised at finding that those who defend the action have been unable to find a single shareholder to give evidence that he did not assent to or, even now, disapproves of that sale. I draw the inference of fact that each individual did assent to it.

In the circular letter convening the next general annual meeting, held on the 24th of December, 1867, among the agenda was "to consider and, if so determined, to sanction a contract which has been entered into by the company with the directors thereof in pursuance of a resolution passed at the last annual meeting, held on the 14th of May, 1867."

At this meeting a formal indenture was produced. [See this indenture, post, p. 282, n. (1)]. By the first clause, the Ashbury Company assigns to the purchasers all benefit which the company has, or is supposed to have, in the Belgian railways, and all contracts, and the benefits of all sub-contracts that have been made, or expressed to be made, in connection therewith. And by the sixth clause the company are to allow their name to be used by the purchasers either as plaintiff or defendant.

By the last clause it is agreed that nothing shall preclude the company from maintaining that such contracts are ultra vires. This last clause may be effectual as between the company and the

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

purchasers, and may, therefore, avail the company in any future proceedings against the directors for breach of trust; but it cannot, in my opinion, prevent the operation of the deed as a ratification of the contracts.

I think that it is not competent for a person, in whose name a contract has been made without authority, to sell the benefit and advantage of that contract, and to authorize the purchasers to sue in his name in order to obtain that benefit, if the contracts should prove advantageous, and at the same time to reserve power to repudiate the contract if it prove a losing contract.

I think that the act of selling the contract is an unequivocal act of election to ratify and adopt it, and that election being once made it is determined for ever.

At the meeting a formal resolution was passed that the seal of the company should be affixed to this indenture, which was accordingly done.

It was argued before us that all this came too late, because, as is stated in the case, early in May, 1866, the directors of the company repudiated all further performance of the above contracts, on the grounds that they were ultra vires, and my Brother Bramwell, in his judgment below, seems to adopt this view, as he says (ante, p. 235), "If it was ratified it was between the 5th of December, 1865, and May, 1866."

I however, do not agree in this. I think that when the plaintiff thus had notice from the directors that they had exceeded their authority and that the company were not bound, the plaintiff might, if he pleased, have declared himself no longer bound; and I think that if he had done so, a ratification would have come too late to bind him.

But he did not do so; and as long as he continued insisting on the contract as a binding one, the company might adopt the contract if for their benefit. This, I think, is clear on principle, and the case of *Soames* v. *Spencer* (1), cited in the argument, is an authority in support of it.

It seems to me, therefore, that in this case there has, in fact, been a complete and deliberate ratification of this contract, under the seal of the company, affixed to the ratification in pursuance

(1) 1 D. & R. 32.

of the resolutions of two successive meetings of the company convened for the express purpose; and that as a fact there is no shareholder in a position to object to that ratification, every one either having previously assented to that ratification or subsequently approved of it.

I do not think it is sufficiently made out that there was any ratification before 1867, but then there was a complete one. I have only further to observe that there is a technical difficulty as to binding a body corporate at law otherwise than by its seal. I should require further consideration before I decided that a ratification by each individual of the whole shareholders, even at law, must be inoperative unless declared by it under its seal; and I should also require further consideration before I decided whether, at law, it was competent for the corporation to set up as a defence that the seal was affixed without the assent of every one of the shareholders; but on the view I take of the facts neither question arises in this case. I therefore come to the conclusion that if, in any case, a company formed under the Companies Act, 1862, can ratify a contract made beyond the scope of the objects for which it is formed, this company has done so.

If this view of the facts is correct it becomes necessary to decide the question of law, viz. whether a corporation constituted under the Companies Act, 1862, can, even under seal, bind itself in its corporate capacity, by a contract for objects beyond the scope of those specified in its memorandum of association as the objects for which it is established. My late Brother Channell, in his judgment in the case below, says: "In some of the earlier cases quoted in the argument in which questions were discussed relating to contracts ultra vires of the companies making them, the question was treated as one of illegality. Whatever may be the case with regard to companies which have been specially incorporated by Parliament for a special purpose, and which use the powers so obtained for other purposes, it seems clearly settled by the more recent authorities that in the case of companies such as that in the present case, the persons constituting the company, that is to say, the shareholders, may bind themselves in their corporate capacity, by their individual assent to contracts not authorized by the memorandum of association or other like instrument by

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

which the constitution of the company is defined. The objection to such a contract is not that it is illegal and therefore unenforceable, but simply that it is unauthorized by the body whom it purports to bind."

The more recent authorities referred to are, I presume, the three cases of *Spackman* v. *Evans* (1), *Evans* v. *Smallcombe* (2), and *Houldsworth* v. *Evans* (3), decided in the House of Lords in 1868, and the *Phosphate of Lime Company* v. *Green* (4), decided in the Court of Common Pleas in 1871.

In the cases in the House of Lords the company had been incorporated under the Act 7 & 8 Vict. c. 110. In the case in the Court of Common Pleas the company was incorporated under the present Act of 1862.

It is, I think, too much to say that these cases clearly settle the point. Instead of saying that these cases clearly settle that the law is as my Brother Channell says, I only say that I *think* them authorities to that effect, and that I *think* such is the law. With this slight alteration I agree entirely with what is above quoted.

7 H & L 673

I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void; and to hold that a contract wholly void cannot be ratified.

But it is of great importance, when we come to construe a statute creating a corporation, to consider what would be the incidents at common law conferred on a corporation created by charter.

The leading authority on this subject is the case of *Sutton's Hospital*. (5) There were many points raised in that case. Those which I think material to the present point arose on a part of the charter set out in the special verdict (6), by which the King incorporated the first governors of the Charterhouse, and expressly

(1) Law Rep. 3 H. L. C. 171.
(2) Law Rep. 3 H. L. C. 249.
(3) Law Rep. 3 H. L. C. 263.
(4) Law Rep. 7 C. P. 43.
(5) 10 Co. 1.
(6) 10 Co. 10 b.

provided, 1. That they should have power to purchase, &c., as well goods, chattels, &c., as lands. 2. To sue, and be sued. 3. To have a common seal, "whereby the same corporation shall or may seal any manner of instrument touching the said corporation and the manor, lands, &c., thereto belonging, or in any wise touching or concerning the same. Nevertheless, it is our true intent and meaning that the said governors for the time being and their successors, nor any of them, shall do, or suffer to be done, at any time hereafter, any act or thing whereby or by means whereof any of the manors, &c., of the said incorporation or any estate, &c., shall be conveyed, &c., to any other whatsoever contrary to the true meaning hereof, other than by such leases as are hereafter mentioned, and that in such manner and form as is hereafter expressed, and not otherwise." The King, therefore, by this charter not only did not in express terms give a power of alienation, but by express negative words forbad any alienation except by lease. But the resolution of the Court, as reported by Coke (at p. 30 b), was that "when a corporation is duly created all other incidents are tacite annexed; . . . and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, 1. by the same to have authority, ability, and capacity to purchase; but no clause is added that they may alien, &c., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c.; that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising, but in a certain form; that is an ordinance testifying the King's desire, but it is but a precept and doth not bind in law."

This seems to me an express authority that at common law it it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case.

If there are conditions contained in the charter that the cor-

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

poration shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by sci. fa. in the name of the Crown to repeal the letters patent creating the corporation: see *Reg.* v. *Eastern Archipelago Company.* (1) But if the Crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation.

I am aware of no decision by which a corporation at common law has been permitted to do so. I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, Does the statute creating the corporation by express provision, or by necessary implication, shew an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, Does the statute creating the corporation by express provision, or necessary implication, shew an intention in the legislature to prohibit, and so avoid the making of, a contract of this particular kind?

I think this is the real question, and for that I refer to the judgment of Parke, B., in *South Yorkshire Ry. Co.* v. *Great Northern Ry. Co.* (2), and the various other cases cited by my late Brother Willes and by myself in *Taylor* v. *Chichester and Midhurst Ry. Co.* (3)

And when we are construing a statute creating and regulating a corporation, it is right to bear in mind that, as Lord Coke says, "It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law:" 2 Inst. 200. Affirmative words may

(1) 2 E. & B. 857; 22 L. J. (Q.B.) 196. 17 Jan 491

(2) 9 Ex. 55, 84; 22 L. J. (Ex.) 305, 313.

(3) Law Rep. 2 Ex. at pp. 375, 389.

no doubt be used so as to imply a negative, see Plowden, Com. 113, but I take it the general principle is that thus laid down by Cresswell, J., in the *Eastern Archipelago Company* v. *Reg.* (1), "that to make the words giving an express liberty or right have the effect of controlling or limiting that which would otherwise exist, they must be very plain."

I now come to consider the construction of the Act of 1862, under which the present company is formed. The sections of the Act of 1862 bearing on the present case seem to me to be only ss. 6, 8, 9, 10, and 12.

By the 6th section of the Act of 1862, any seven persons may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability.

The 8th, 9th and 10th sections provide that the memorandum of association shall contain the objects for which the proposed company is to be established.

The 12th section provides that the company may make certain specified alterations in the memorandum of association, not including a change in the objects for which the company is to be established, and then, in express negative words, provides that, "save as aforesaid, no alteration shall be made in the conditions contained in the memorandum of association."

The objects of the proposed company must, therefore, always remain the same; and that has, I think, two important effects. First. I think that if the company, as a body, propose to do anything beyond these objects, any one dissentient shareholder (who has not precluded himself from doing so) may prevent it from doing so.

Secondly. No person can be entitled to fix the company with a contract made by the board for any purpose beyond those objects, on the ground that the board had an ostensible or apparent authority to make contracts of that kind, but must, in order to fix the company, at least prove an actual authority given to the board to make the particular contract he seeks to enforce.

Now, if I thought that it was at common law an incident to a

(1) 2 E. & B. at p. 888; 23 L. J. (Q.B.) 82.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

corporation that its capacity should be limited to the extent conferred on it by the instrument creating it, I should agree that the capacity of a company incorporated under the Act of 1862 was limited to the objects in the memorandum of association. But if I am right in the opinion which I have already expressed, that the general power of contracting is an incident to a corporation which it requires an indication of intention in the legislature to take away, I see no such indication here. There are not even affirmative words, those used in s. 25 of 7 & 8 Vict. c. 110, to which I shall now refer, having been (I presume advisedly) not repeated.

The 7 & 8 Vict. c. 110, s. 25, enacts that from the date of the certificate the shareholders shall be incorporated "by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this Act and of such deed as aforesaid." And then express powers are given to the company to enter into contracts for any "necessary purpose of the company."

I think if the question was whether the legislature had conferred on a corporation created under this Act capacity to enter into contracts beyond the provisions of the deed, there could be only one answer. The legislature did not confer such capacity.

But if the question be, as I apprehend it is, whether the legislature have indicated an intention to take away the power of contracting which at common law would be incident to a body corporate and not merely to limit the authority of the managing body and the majority of the shareholders to bind the minority, but also to prohibit and make illegal contracts made by the body corporate in such a manner that they would be binding on the body if incorporated at common law, I think the answer should be the other way. There certainly is ground for suspecting that the person who framed the Act 7 & 8 Vict. c. 110, thought that the corporation would have no other powers than those thus expressly given to it, and perhaps meant to restrict its powers accordingly, but when we remember the canon of construction that affirmative words do not take away the common law right, I think he has not used words sufficient to effect such a purpose. It

would be different if negative words had been used, and it had been said that the company should not do any other acts than those necessary for the purpose for which it is formed.

The two Acts, 7 & 8 Vict. c. 110, and the Act of 1862, are so much in pari materiâ, that if it had been settled by judicial construction that a company under 7 & 8 Vict. c. 110, was forbidden to make any contract for objects beyond those specified in the deed, I should endeavour to put the same construction on the Act of 1862, unless the change in the language shewed an intention in the legislature to alter the law.

There are many dicta in courts of equity, worthy of great respect, which indicate an opinion not only that such acts are beyond the authority of the board, or even of a majority of the shareholders, but also that they are beyond the capacity of the company though unanimous.

These are worthy of great attention; but I can find no case in which it has been decided that a contract so made or ratified by the whole company that it would have bound the company in its corporate capacity (but for the provisions of the statute), has, either at law or in equity, been held void on account of the provisions of that Act. And I think that the three cases, already referred to, of *Spackman* v. *Evans* (1), *Evans* v. *Smallcombe* (2), and *Houldsworth* v. *Evans* (3), all decided in the House of Lords, are at least authorities for the contrary doctrine.

The question in all three cases was, whether a person, who had many years ago de facto retired from the company under an arrangement made with the directors, was still a shareholder in point of law, and therefore ought to be put on the list of contributories.

In all three cases it was agreed that it was beyond the competence of the board of directors, or even of a majority of the shareholders, to allow such a retirement. In *Spackman's Case* (1), the majority of the Lords, Lords Cranworth, Chelmsford, and Colonsay, thought it not proved that the whole body of shareholders had ratified the arrangement under which Spackman went out, and consequently he was retained on the list of contributories, Lord St. Leonards and Lord Romilly, dissenting.

(1) Law Rep. 3 H. L. C. 171. (2) Law Rep. 3 H. L. C. 249.
(3) Law Rep. 3 H. L. C. 263.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

In *Smallcombe's Case* (1), the majority of the Lords, Lord Cairns and Lord Cranworth, thought it was sufficiently proved that all the shareholders had ratified the arrangement under which Mr. Smallcombe went out, and consequently he was removed from the list of contributories, Lord Chelmsford dissenting.

In *Houldsworth* v. *Evans* (2) the majority of the Lords (Lord Cairns and Lord Chelmsford) thought it not sufficiently proved that the arrangement under which he retired was brought to the notice of all the shareholders, and consequently he was retained on the list of contributories, Lord Cranworth dissenting.

The differences of opinion, though chiefly on the questions of fact, were sufficient to secure that the cases should be very carefully considered, and consequently all that is said in them is of high authority.

In the first of the cases, *Spackman* v. *Evans* (3), all the Lords who formed the majority based their decisions on the aosence of satisfactory proof that the arrangement was ratified by all the shareholders. Lord Cranworth says, p. 190: "The act of the directors in cancelling the shares of the appellant, though not warranted by the deed of settlement, would be valid if it was either previously authorized or subsequently ratified by all the shareholders." And at p. 194 he says: "Looking at all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular, that is, knew that they were acts not authorized by the deed, and not done in pursuance of the notice given to every shareholder by the circular of the 4th of November, 1848."

It certainly seems to me, that, when using this language, Lord Cranworth had in his mind the words of the 25th section of 7 & 8 Vict. c. 110, previously quoted, and meant to express an opinion that the acts of the directors not authorized by the provisions of the deed were illegal in them, but were capable of ratification by the corporation. Lord Chelmsford also says, p. 234: "It is quite clear that to render valid an act of the directors of the company

(1) Law Rep. 3 H. L. C. 249. (2) Law Rep. 3 H. L. C. 263.
(3) Law Rep. 3 H. L. C. 171.

which is ultra vires, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz. the acquiescence of each and every member of the company."

Lord Colonsay also dwells on the absence of proof of knowledge on the part of the shareholders, though I do not think his language indicates so strongly that he thought that this, if proved, would have been decisive in Spackman's favour.

In the subsequent case of *Evans* v. *Smallcombe* (1), Lord Cairns says (speaking of *Spackman* v. *Evans* (2)), "I apprehend I am correct in stating that it was the opinion of the majority of your lordships in that case, indeed, I think it was the opinion of all your lordships who were present, that, looking to that arrangement, which has been called throughout in this case the Chippenham arrangement, it would have been competent for any shareholder in the company to object within a reasonable time to that arrangement, that the arrangement was one which was ultra vires of the directors, and which, if supported at all, could only be supported by reason of the consent or acquiescence of all the shareholders in the company, or by the proof of such a state of facts as would lead to the reasonable inference that there had been that consent or that acquiescence."

These cases decided in the House of Lords are binding on us as far as they go. I agree that they do not precisely decide the very question before us. In the first place they were decisions as to a company incorporated under 7 & 8 Vict. c. 110, which differs in its language from the Act of 1862. It seems to me that the difference in the wording of the two Acts is such that it is more plausible to say that 7 & 8 Vict. c. 110, is prohibitive, than to say that the Act of 1862 is so. In the next place, the question raised was whether a particular person was to be inserted on the list of contributories, which, as pointed out by Lord St. Leonards, is an equitable question, and in a court of equity the distinction between the body corporate and the whole of the individuals who, in the aggregate, form that body corporate, is not so important as in a court of law. The present question is a purely legal one, viz., whether the body corporate is bound by this contract. But I

(1) Law Rep. 3 H. L. C. 249, at p. 253. (2) Law Rep. 3 H. L. C. 171.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

take it that the question whether the statute 7 & 8 Vict. c. 110, rendered a proceeding beyond the provisions of the deed illegal, that is, malum prohibitum, is the same in equity as at law. The act, illegal in that sense, could no more be adopted and set up in equity than at law; and I therefore apprehend these cases do decide conclusively that an arrangement such as that come to in *Evans* v *Smallcombe* (1) was not forbidden by the statute 7 & 8 Vict. c. 110.

It was argued by the counsel for the defendants before us that the object there was to enable one of the partners to retire, which might have been done consistently with the provisions of the deed in some other way; and perhaps that it fell within the general power given to companies in the twelfth subsection of s. 25—viz. "to perform all other Acts necessary for carrying into effect the purposes of such company, and in all respects as other partnerships are entitled to do." Lord Romilly, who was one of the dissentient minority in *Spackman* v. *Evans* (2), says: "Of course, if this company had bought mines, or entered into a contract to set up a steam-packet business, this would have been simply void, and would not have bound the company or any one, because they could do nothing that was beyond the objects of the company;" which may be construed as indicating that he had some such distinction in his mind. I think, however, when looked at with the context, he must be understood as merely saying that the arrangement was voidable, not void, standing good till some one entitled to do so took steps to avoid it, whilst such an act as he supposed would be void till affirmatively ratified. With this exception I have looked through the opinions delivered in the House of Lords without finding anything to indicate that such a distinction was in the mind of any one of the noble and learned lords; and I think that we should hardly be following out the ratio decidendi of the majority of the House of Lords if we acted on such a distinction.

I do not think we can properly enter on the consideration of what it would have been politic in the legislature to enact. If we could do so, I think much might be said on both sides.

I am impressed with the hardship on incoming shareholders,

(1) Law Rep. 3 H. L. C. 249. (2) Law Rep. 3 H. L. C. 171, at p. 244.

who, it is said, have a right to believe that the company is carrying on the business for which it is formed and no other. And though, of course, if the property of the company has been already squandered on unauthorized transactions or embezzled, the incoming shareholder must bear that loss; yet it is hard on him to be made liable to a contract beyond the objects of the company, even though that contract must by supposition have been ratified by the outgoing shareholders through whom he derives title.

On the other hand, it may often happen that when the shareholders first learn that the unauthorized contract has been made, their capital may be already so inextricably engaged in it that to stop the contract would be certain ruin, and to go on would give a very fair prospect of extricating themselves without much loss, perhaps with profit.

And the recent cases in the House of Lords shew what very great hardships may fall on third persons if a transaction is always to be held void, though ratified by the whole shareholders.

And I do not see any risk of a company practically carrying on business for other objects than those named in the memorandum. The difficulty of obtaining the assent of all shareholders, and of proving that it had been obtained, is so great that no sensible man would trust to that and deal with the company on those terms.

But I do not think that we can ask what ought to have been enacted by the legislature. Our duty is to declare what has been actually enacted.

And I think, for the reasons I have above given, that in this case the unanimous shareholders have in fact assented to the ratification under the seal of the company of this contract; and that such a ratification, at all events, makes the contract binding on the company in its corporate capacity.

I think, therefore, that the judgment of the Court below should be affirmed.

My Brothers Brett and Grove agree in this judgment.

As this Court is equally divided, the judgment appealed against must be affirmed.

ARCHIBALD, J. (1) This is an action by the plaintiff, as sur-

(1) Keating and Quain, JJ., concurred in this judgment.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

viving partner in the firm of Riche Brothers, railway contractors, domiciled at Brussels, to recover from the defendants damages for the breach of certain contracts of the 30th of January and the 14th of October, 1865.

The case comes before us on error from the Court of Exchequer. The facts are set out in a special case and appendix, the Court having power to draw inferences of fact; and the question submitted is, whether the plaintiff is entitled to recover any damages from the defendants. The judgment of the Court below was in favour of the plaintiff, the majority of the Court being of opinion that the question should be answered in the affirmative.

Ante 226

The defendants are a limited company, incorporated in September, 1862, by the name of the Ashbury Railway Carriage and Iron Company, under the Companies Act, 1862. By the 3rd clause of their memorandum of association, the objects of the company are thus stated:—

"3. The objects for which the company is established are, to make, or sell, or lend on hire railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents."

By article 4 of the articles of association it is provided that "an extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." No special resolution was ever passed in the terms of that article, and there has been therefore no modification or extension of the objects of the company as set forth in the memorandum of association.

It appears by the articles of association that the company had purchased of John Ashbury the business carried on by him at Openshaw and Ardwick, in the county of Lancashire, which business was the building of railway carriages and waggons, and the making of turntables, points, crossings, and roofs, but it had never been extended to the construction of railways, or the supply of money for such construction.

By the agreement John Ashbury engaged to accept the office of managing director of the company for the space of one year at least. The company having been thus constituted it appears that on the 14th of March, 1864, the Belgian Government had granted to Messrs. Gillon & Baertsoen (subjects of Belgium) a provisional concession (which afterwards became absolute) for the construction of a line of railway in Belgium, from Antwerp to Tournai, which it was expected would be continued to Douai, in France, with the option of taking a further concession of such part of the line to Douai as would be within the Belgian frontier. The concessionaires had power to transfer the concession to a third party.

By the terms of the concession the sum of 20,000*l.* was to be deposited as caution money. Of this sum the concessionaires had, before the month of January, 1865, deposited 1000*l.* They had also, prior to the date of the concession, entered into a contract with Messrs. Riche (the plaintiff and his deceased partner) for the construction of the railway from Antwerp to Tournai and its two branches, with all accessories, and for the supply of the rolling and fixed plant for the sum of 806,604*l.*, of which they were to receive in bonds 500,924*l.*, and in shares of a société anonyme 305,680*l.* The concession operated as a lease of the enterprise to the concessionaires for the period of ninety years (articles 34, 35), during which period they would continue liable to the Belgian government for the performance of the conditions stipulated in the grant. But the concessionaries were at liberty to assign their rights and transfer their obligations to a société anonyme to be constituted in accordance with the law of Belgium, who were in that event to be substituted for them, as if the concession had been granted to such society directly.

The facts in connection with this concession having come to the knowledge of Mr. James Ashbury, then assistant acting director of the Ashbury Company, it occurred to him that a large profit was to be made out of the concession if the construction of the line and the supply of the fixed and rolling stock were carried out by Messrs. Riche Brothers on the terms so agreed upon between him and Messrs. Gillon & Baertsoen, and that it would be desirable to secure the concession for the Ashbury Company. Accordingly, negotiations were entered into by him (assuming to act on behalf

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

of the Ashbury Company) and the parties in Belgium, and after a report by him on the subject to the directors of the Ashbury Company, he was eventually, by a resolution of the board of directors, passed on the 19th of January, 1865, authorized to conclude any contract having reference to the concession of the Antwerp, Tournai, and Douai Railway, subject to the ultimate approval of the board, and was supplied by the directors with 26,000*l.* of the money of the company for the purpose of paying 20,000*l.* in respect of the deposit or caution money, and 6000*l.* to the concessionaires on account of the sum to be ultimately received by them for the transfer of the concession. He accordingly proceeded to Brussels, and there, on the 30th of July, 1865, the contracts described in the case as A, B, C, and D were entered into by him in the name and professing to act as the agent of the Ashbury Company.

The first of these contracts, A, recites generally the facts in connection with the concession, and the obligation of the concessionaires towards the government. It also refers to the agreement between the concessionaires and Messrs. Riche Brothers for the construction of the line, and then proceeds to assign the concession to the Ashbury Company in such wise, "that they shall be to all intents and purposes in the lieu and stead of Messrs. Gillon & Baertsoen." In consideration of this transfer the company undertake to reimburse to Gillon & Baertsoen the amount of the caution money (1000*l.*) already paid by them, and to pay the residue of the caution money to the government, and to pay to Gillon & Baertsoen 1,752,630 francs (including the caution money) half in money and half in paid-up shares of a société anonyme to be formed, and they also bind themselves to perform in all respects the engagements, charges, and obligations entered into by Messrs. Gillon & Baertsoen both with the Belgian government and with Messrs. Riche Brothers. They also engage to constitute a société anonyme according to the law of Belgium, with a capital of a stipulated amount by which the execution of the line was to be secured, Messrs. Gillon & Baertsoen agreeing to concur with the defendants in a transfer of the concession to the proposed society, so that Messrs. Gillon & Baertsoen should be released from their obligations towards the state.

The agreement also contained stipulations with respect to the

option of taking the concession of the section on the Belgian frontier, to which, however, it is unnecessary to refer.

The contract B purported to be made between the proposed société anonyme and Messrs. Riche Brothers, and embodied the terms upon which the latter were to undertake the construction of the line, and James Ashbury, among others, having accepted the functions of a director of the proposed société anonyme, undertook when that society was finally constituted to accept and sign the agreement in the name of the Ashbury Company, so as to make it binding. It may be as well to mention here that the société anonyme was afterwards, on the 27th of October, 1865, duly constituted, that Messrs. Riche declared that they accepted the contract for construction of the line, and that the contract B was approved and ratified on behalf of the society.

The contract C purported to be made between the Ashbury Company, represented by Mr. James Ashbury, their assistant managing director, on the one part, and Messrs. Riche Brothers on the other part. After reciting the concession and its transfer, and the agreement between Riche Brothers and Messrs. Gillon & Baertsoen, of the 28th of April, 1863, it proceeds to define the terms as between the Messrs. Riche Brothers and the Ashbury Company, on which the former are to construct the railway, and the manner in which payments are to be made by that company to the société anonyme, for the benefit of Messrs. Riche Brothers.

By this agreement the Ashbury Company undertake to supply the fixed and rolling stock of the said intended railway (thus liberating Messrs. Riche Brothers' firm from so doing), and to make payments at certain agreed rates to the société anonyme for the benefit of Messrs. Riche Brothers.

By contract D, purporting to be made between Riche Brothers and the Ashbury Company, the latter re-conveyed to Messrs. Riche Brothers the contract for the rolling stock, in consideration of deductions to be made from the amount to be paid by the Ashbury Company to the société anonyme.

The reasons for this modification of the arrangements are explained in paragraph 13 of the case. (1)

(1) Paragraph 13. "The reason for the arrangement contained in D, as stated by the said Mr. James Ashbury to his directors, was that the minister

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

On the signature of these contracts, Mr. James Ashbury paid over the 20,000*l.*, as stipulated, and a subscription was made in the name of the Ashbury Company, of 60,000*l.* towards the required capital of the société anonyme.

Mr. James Ashbury, on his return, made, on the 8th of February, 1865, a written report to a board meeting of what had been done. The report was approved and confirmed by the board, and, together with a guarantee of a company called the Plant Company (to which it is not necessary to make any further reference), and the contract with Messrs. Riche Brothers, was ordered to be registered and preserved in the office of the company at Openshaw.

At this stage, the board of directors of the Ashbury Company entertaining doubts as to their power to bind the company by such contracts, proposed to transfer the liability and advantage of these contracts to some other company existing or to be formed for the purpose; but before this scheme had made much, if any, progress it was suspended or abandoned.

In the months of July, August, and September, 1865, the plaintiff made the necessary plans and surveys for constructing the line of railway, and Mr. McCandlish was appointed by the directors of the Ashbury Company chief engineer of the line, and was afterwards, on the 4th of October, 1865, accredited by them to the plaintiff as the engineer with whom he might arrange all details, and by whom his plans were, if necessary, to be approved.

Early in October, some modification of the existing agreement being deemed necessary, the board of directors of the Ashbury Company sent Sir Cusack Roney and Mr. Tahourdin, their solicitor, over to Brussels with authority from the board to make final arrangements in relation to the contracts of the 30th of January,

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would not allow the proposed rolling stock for the line to enter Belgium free of duty, and that the proposed prices for such rolling stock would therefore not be such as would leave a profit to the defendants, and that he therefore proposed to Messrs. Riche Frères that they should manufacture their own stock, or sublet it in Belgium, and pay the defendants for the profit they would have had if the plant had been constructed at Openshaw. Ultimately the arrangement was that Messrs. Riche should provide the stock and take all responsibility thereon, and that the Ashbury Company should receive as compensation the sum of 20,000*l.* in shares at par, such shares, of course, bearing no interest during construction."

1865; and on the 14th of October, 1865, Sir Cusack Roney, in the name, and professing to act as the agent of, the Ashbury Company, entered into the contracts referred to in the special case, as marked X, Y, and Z.

Contract X purports to be made between Messrs. Gillon & Baertsoen of the first part, the Ashbury Company of the second part, and Messrs. Riche Brothers of the third part. It has reference mainly to the stipulation in the former contract with regard to the option to take the concession from Tournai to Douai, which it modifies to some extent, as to the period during which the option of the defendants' company to accept or decline the concession is to be exercised. The material parts of it, with reference to the questions in this case are, that it provides that the conventions of the contract of the 30th of January, 1865, as to the Antwerp and Tournai section of the line, are to be strictly maintained, except that the Ashbury Company are to appoint three instead of two commissioners of the société anonyme, as originally stipulated.

The contract Y was an additional or supplemental agreement to the contract B, modifying the quantities of work and the distribution of the cost of construction, in consequence of changes in the statutes of the société anonyme, required by the Belgian government.

The contract Z purports to be made between the Ashbury Company, represented by Sir Cusack Roney, on the one hand, and Messrs. Riche Brothers, on the other.

After reciting the contracts of the 30th of January, 1865, and that it had been agreed that the capital of the société anonyme for the Antwerp and Tournai Railway, which was to be 32,760,000 francs, should be represented by 55,000 bonds, at 3 per cent., on a capital of 500 francs, reckoned at 250 francs, and by 38,020 shares of 500 francs each, and a wish to modify the agreement between the Ashbury Company and Riche Brothers, it is substituted as a final settlement of the rights and liabilities of the Ashbury Company and Messrs. Riche.

After articles in substance binding the Ashbury Company to complete the société anonyme, and binding Messrs. Riche Brothers to carry out the construction of the line, in accordance

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

with the conditions already settled between them and the proposed société anonyme, it is declared that Messrs. Riche Brothers have accepted the contract only after having secured to themselves and obtained the co-operation of the Ashbury Company, who have bound themselves to supply them with the funds necessary for the carrying out of their undertaking, and the Ashbury Company bind themselves to pay into the funds of the société anonyme an amount in cash of 15,316,000 francs, in exchange for the 55,000 bonds, taken at the rate of 250 francs each, part of the intended capital of the proposed société anonyme, and 3132 shares taken at par, such payments to be effected gradually in the proportion of the payments that were to be made to Riche Brothers, and in such a manner that the latter should always receive from the société anonyme an amount of 15,316 francs, in cash, upon a total certificate of 32,760 francs, and so on in the same ratio.

There are also provisions in the contract relating to the Douai section of the line in the event of the concession being claimed and accepted by the Ashbury Company, but it is not necessary to make any further reference to them.

I have thought it expedient to state thus fully the circumstances under which these contracts were entered into, as they are found by, or are to be inferred from, the facts stated in the special case, and the substance of such of their provisions as are important, because the manner in which the contracts are connected may have a material bearing upon the question how far, if not originally binding on the Ashbury Company, they have been rendered so by the subsequent conduct of the shareholders.

Engagements somewhat similar to those which were entered into with reference to the Belgian concession had also been entered into by the directors of the Ashbury Company in regard to a concession, in Spain, of a line of railway called the Madrid, Placentia, and Malpartida Railway, upon which large advances had been made by the directors out of the funds of the Ashbury Company. In neither case was there any ultimate contract binding the Ashbury Company to supply any fixed or rolling stock, and in the case of the Belgian contracts, the substance of the arrangements entered into was that the Ashbury Company were to supply the funds for the construction of the line.

The plaintiff having, as already mentioned, made the necessary plans and surveys for constructing the line of railway, proceeded, after the 14th of October, 1865, to construct the line, and entered into several contracts with other persons for that purpose.

In respect of this work, pay-sheets were sent to the société anonyme, approved and countersigned by Mr. McCandlish, as engineer, and the proper proportion of each pay-sheet was paid in cash into the treasury of the société anonyme by the directors of the Ashbury Company in the name of the company.

In October, 1865, the board appear to have been advised that the agreements were ultra vires of the directors, and not binding on the company, and that the 26,000*l.* could not be recovered back; and thereupon a scheme for the transfer of the concession was revived by the directors, and a company was projected for the purpose of taking over the contracts, to be called the Antwerp, Tournai, and Douai Railway Contract Company, Limited.

The first information with reference to these Belgian contracts which appears to have been given to the shareholders generally of the Ashbury Company was at the third annual general meeting of the company on the 5th of December, 1865.

That meeting was convened by a circular of the 27th of November, 1865, in which the business to be transacted was stated to be, inter alia, "to declare a dividend payable out of the balance as shewn by the balance sheet sent therewith."

The balance sheet referred to was made up to the 30th of September, 1865, and on the credit side were the following items:—

"Advances on contracts:—

"Madrid, Placentia, and Malpartida Railway £41,338 11 10

"Anvers, Douai, and Tournai Railway . . 27,191 14 8"

At this meeting it appears that these Belgian and Spanish contracts were the subject of strong observations, and that the chairman gave the meeting to understand that the item in respect of the Belgian contract would not appear again in the accounts, it being then considered that it would be taken over by the Antwerp, &c., Contract Company. (1)

(1) This appeared from the report of the committee of investigation referred to below, which was printed in the appendix to the special case.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

A resolution was passed at this meeting in these terms, viz. "That the accounts now read be approved and adopted," and a dividend for the year was declared out of the balance.

On the 20th of December, 1866, an extraordinary general meeting of the Ashbury Company was held, at which a committee of shareholders was appointed "to inquire into the past proceedings and present position of the company, and the best means of conducting its business for the future, with power to take such legal advice as they might deem desirable, and report to an early meeting of the shareholders."

The committee proceeded with the inquiry referred to them, and prepared a report; and, at an extraordinary meeting of the shareholders, held on the 1st of May, 1867, the report was read, and ordered to be entered on the minutes of the company. The report gives the history of the Belgian contracts, and the various steps taken by the directors in regard to them, together with observations on the advances in respect of the enterprise appearing in the balance-sheet of the 30th of September, 1865; and states, in substance, that the committee had been advised that the contracts were ultra vires, and that the shareholders were not bound by anything that had subsequently passed, but that the directors were liable to replace the moneys of the company which had been misapplied on the impeached transactions. The report, however, in conclusion, recommends an endeavour to effect an amicable settlement with the directors, without having recourse to legal proceedings. Three of the shareholders were thereupon deputed by the meeting to confer with the directors, with the view of an agreement being arrived at on the matters in dispute.

Ante 259

On the 14th of May, 1867, the fifth annual meeting of the company was held. This meeting was convened by a circular to the shareholders stating, among other objects of the meeting, as follows: that it was convened "to receive, consider, and if so determined, to adopt any report or recommendation which may be made by the committee appointed at the extraordinary meeting of the company held on the 1st of May, instant, to confer with the directors with the view to an agreement being arrived at on matters in dispute."

At this meeting a balance sheet was presented, made up to the

30th of September, 1866, shewing, on the credit side, advances on the Spanish and Belgian contracts in precisely the same form as that appearing on the balance-sheet of the previous year. Mr. Hulse, one of the deputation appointed to confer with the directors with respect to these items, reported the result of a conference with the directors, and it was resolved that the following recommendation of the deputation be received and adopted, viz.:—

"That, having reference to the proceedings at the annual meeting of shareholders in the year 1865, in regard to the intention of the directors and other parties taking over the Antwerp, Tournai, and Douai Railway concession contract, and having reference also to the anticipated loss on the said contract, and also on the amount advanced by the Ashbury Company on the Madrid, Placentia, and Malpartida Railway concession contract, and the differences that have arisen in regard to the legality of these items of expenditure appearing in the Ashbury Company's accounts, it is for the interests of the company that the following arrangement should be accepted, and that the same be accepted accordingly, and that it be referred to the solicitor of the company to carry it out in such way as counsel shall advise.

"1st. Messrs. James Ashbury, B. Whitworth, M.P., F. A. Finney, Alfred Peek, James Holden, Thomas Hodson, Jno. Whitehead, jun., W. A. Cunningham, Thos. Vickers, the executor of John Ashbury and Geo. Wood, by themselves or their nominees, hereinafter called the purchasers, to purchase from the Ashbury Company for the sum of £ , to be paid by four equal half-yearly instalments secured by promissory notes, without interest, any estate or interest which the company may have in the Antwerp, Tournai, and Douai concession contract, and the Madrid, Placentia, and Malpartida concession contract, on which the company may have paid sums amounting together to the sum of £ . All interest due by the Spanish Government on the Malpartida contract advance to belong to the Ashbury Company to this date.

"2nd. The Ashbury Company to take any legal proceedings in enforcing the claims, or defending any actions, or otherwise in relation to the said businesses, which may be required in the name of the Ashbury Company, but at the expense of the said pur-

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

chasers, who are to indemnify the Ashbury Company against all claims and liabilities which have arisen, or may hereafter arise, in connection with the said concession contracts, or either of them, or which may be incurred in using the name of the company."

Subject to this resolution, the balance sheet and accounts for the year ending the 30th of September, 1866, were approved and adopted, an alteration being made in the balance sheet by omitting the amount of the advance on the Spanish contract, and changing the entry as to the advance on the Antwerp and Tournai contract into the following form, viz.—

"Advance on contracts, viz.:—

"Madrid, Placentia, and Malpartida Railway, and Anvers, Douai, and Tournai Railway, taken as per resolution of shareholders, May 14th, 1867 . . . . . £27,705 0 3."

It was resolved also that the shareholders who formed the deputation should superintend the completion of the proposed agreement.

On the 24th of December, 1867, the sixth annual meeting of the company was held.

This meeting was convened by a circular to the shareholders stating that, among other things, the meeting was held to transact the following business, viz. "to consider and, if so determined, to sanction a certain contract which has been entered into by the company with the directors thereof, in pursuance of a resolution passed at the last annual meeting of the company, held on the 14th of May, 1867."

At this meeting it seems tolerably clear that all the shareholders did not attend, but it must be presumed that the circular was sent to all. The deputation reported the terms of the agreement entered into with the directors, which was in the form of an indenture purporting to be made between the Ashbury Company of the first part, and certain directors and shareholders of the company, therein described as the purchasers, of the second part. (1)

Ante 259

(1) By this deed, after reciting that the company had been engaged in negotiations and transactions connected with the Belgian and Spanish railways in question and with the Antwerp, &c., Contract Company, in the course of

The resolution of the 14th of May, 1867, for the settlement of the differences between the directors and the company was sanctioned and confirmed, and it was resolved that the agreement reported, which had been entered into in pursuance of that resolu-

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which the company had made large advances, which appeared in the accounts submitted to the general meeting of the company as amounting in 1865 to 68,530*l.* 6*s.* 6*d.*, but which had been reduced in 1866 to 62,380*l.* 6*s.* 2*d.*; and that the company had been advised that all negotiations and transactions on its behalf or on its account with respect to the said railways were ultra vires, and that the company was not bound thereby, and that the company in fact disclaimed all liability and obligation in respect thereto, and had required the parties of the second part (being or representing the directors of the company who entered into such negotiations and transactions on the part of the company) to take upon themselves all the contracts and liabilities arising out of, or connected with, or consequent upon such negotiations and transactions, and to indemnify the company therefrom as thereinafter provided; and that with a view to the future satisfactory working of the affairs of the company certain proposals, having for their object a settlement of all disputes and differences in relation to or arising out of the matter aforesaid, were made to a special meeting of the company, held on the 14th of May, 1867 (reciting the proposals and their adoption, and that it was referred to the solicitor of the company to carry them out in such way as counsel should advise); and that since the date of the meeting certain arrangements had been made between the company and the *purchasers*, under which 13,938*l.* 13*s.* 1½*d.* had been paid by the purchasers to the company in discharge and settlement of one-half of the sum of 27,705*l.* 0*s.* 3*d.*, and of all claims for interest which either of the parties had upon the others in respect of the several monetary transactions arising out of the matters thereinbefore mentioned up to the 30th of September, 1867.

It was witnessed that in pursuance of the resolution and arrangements, and in consideration of the agreement thereinafter entered into and the promissory notes to be given by the purchasers, the company agreed with the purchasers as follows:—

1. That the company would, at the request and expense of the parties requiring the same, make, do, and execute all such assignments, acts, matters, and things, as the purchasers respectively, or their counsel, might reasonably require and advise, for assigning to and vesting in the purchasers and their respective executors and administrators, in proportion to the amounts to be paid by them respectively upon the said promissory notes, all the rights, claims, estates, interest, and benefit of every description which the company had, or were supposed to have, upon or in respect of or in relation to the said Spanish and Belgian railways respectively, or the concessions thereof respectively, or the fixed or rolling plant thereof respectively, and the deposits, caution-moneys and other sums, and interest or dividends made, or paid, or accrued, or thereafter to accrue, in relation thereto or connected therewith, and all contracts and securities for the same, and the benefit of all sub-contracts which had been made, or expressed to be made, in connection

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

tion, should be adopted and confirmed, and that the seal of the company should be affixed thereto.

The balance sheet made up to the 30th of September, 1867, was also adopted with this modification, that the entry which stood previously "Advances on contracts, 25,783*l.* 7*s.* 4*d.*" was directed to stand thus on the credit side of the account—"Advances to be refunded, in accordance with a resolution passed at a meeting of shareholders on the 14th of May, 1867, 27,705*l.* 0*s.* 3*d.*" The seal of the company was accordingly affixed to the indenture, which was also duly executed by the other parties to it.

Under these circumstances, it was contended before us on behalf of the defendants, first, that the contracts with the plaintiff were ultra vires of the directors of the Ashbury Company; secondly, that they were incapable of ratification by the shareholders so as to render them binding on the company in its corporate character; thirdly, that, if not incapable of ratification, they were not, in fact, ratified and rendered binding.

As regards the first of these contentions, we intimated during

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therewith, with governments, or companies, or individuals.

2. That the purchasers should be considered as having been let into possession of the purchased property on the 30th of September, 1866.

By the three following clauses the purchasers agreed, on the execution of the indenture by the company, to make and deliver to the company their respective promissory notes for the respective sums set opposite to their names in the schedule, and (in the same proportion) to indemnify and save harmless the company and their property and effects from and against all the obligations of every description which had been entered into or undertaken by the company or any of its directors or agents, in respect of and arising out of the contracts and premises agreed to be assigned, or upon the use of the company's name in pursuance of the following clause:—

6. That the company should, at the costs and risks of the purchasers, allow its name to be used as plaintiff or defendant, as the case might require, in or about any actions, suits, or other proceedings which might be commenced or prosecuted in relation to the premises.

7. That nothing therein contained should be construed, deemed, or taken to be an admission by the company that all or any of the negotiations and transactions thereinbefore mentioned were legally binding on the company, or to preclude the company from maintaining and alleging that such negotiations and transactions were ultra vires, if they should be advised so to do, in any proceedings at law or in equity which might be taken, commenced, or prosecuted against the company in respect of the said negotiations and transactions, or any of them.

the argument our opinion that the Belgian contracts were in excess of the powers of the directors, and beyond the scope of the memorandum of association: *Taylor* v. *Chichester and Midhurst Railway Co.* (1) I agree entirely with my Brother Bramwell in his observations on the language of the memorandum of association to the effect that the words "carry on the business of mechanical engineers and general contractors" cannot be held to authorize generally the making of any contract whatever. They must, having regard to the context, be restrained to contracts for the execution by the company, or their servants, or agents, of mechanical engineering works, or other like works, and cannot be extended to such contracts as those in question.

The history of the formation of the company, though perhaps not admissible for the purpose of construing the memorandum, shews that such contracts were never contemplated; for the business purchased, which had been carried on by Mr. John Ashbury at Openshaw and Ardwick, had never been extended to the construction of railways, or to agreements of a "financing" description.

As regards the second point, namely, that the contracts were incapable of ratification by the shareholders so as to render them binding on the company in its corporate character, it was argued on behalf of the defendants that the contracts in question were so entirely beyond the competency of the company, that if every shareholder had agreed to them, and the corporate seal had been affixed to them, they would nevertheless have been invalid; and this was said to result from the true construction and effect of the Companies Act, 1862, under which the company was constituted. In support of this proposition it was contended that the contracts in question being beyond the scope of the memorandum of association were impliedly forbidden by the provisions of the 4th, 8th, and 12th sections of the Act; that although within certain limits provision is, by the conjoint effect of ss. 12, 13, and 50, made for changes or modifications of the conditions contained in the memorandum of association in pursuance of a special resolution, yet that the power to change or modify the conditions of the memorandum is limited to the increase or the consolidation of the capital

(1) Law Rep. 2 Ex. 356.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

or its division into shares, or its conversion into paid-up shares or stock, or by s. 13 to a change, with the approval of the Board of Trade, of the name of the company; and that the 4th of the company's articles of association, therefore, in so far as it impliedly authorized an extension of the business of the company by a special resolution, was at variance with the express provisions and spirit of the Act and wholly nugatory; and that it was impossible by any such resolution to enlarge the corporate capacity of the company so as to embrace such contracts as those in question.

It was not denied that if the corporate capacity of the company could be extended by such a resolution, then that contracts, which would have been regular and binding if such a resolution had been passed, might be subsequently sanctioned and ratified by all the shareholders, if entered into by the directors without having previously obtained the requisite authority.

But on the ground that the corporate capacity of the company was incapable of such extension, it was sought to distinguish this case from those of *Spackman* v. *Evans* (1), *Evans* v. *Smallcombe* (2), and *Houldsworth* v. *Evans* (3), in all of which it was taken for granted that the contracts then in question might, though ultra vires of the directors, have been ratified with the assent of all the shareholders, the company in those cases having been established under a different Act, viz. the 7 & 8 Vict. c. 110, and the contracts impeached not having been either expressly or impliedly prohibited by the conditions on which the company was originally constituted.

Mr. Watkin Williams also, upon this point, adopted as part of his argument the following passage from Lindley on the Law of Partnership, vol. i. p. 262: "With respect to those acts which directors have no power to do at all, it must be borne in mind that corporations have no greater capacity than is conferred upon them by their constitution. They exist for certain purposes more or less well defined in the instrument incorporating them, but they exist for no other purposes, and a corporation created for one purpose cannot lawfully do anything which is foreign to the purpose for which alone it was created. If, therefore, it can be predicated of any contract

(1) Law Rep. 3 H. L. C. 171. (2) Law Rep. 3 H. L. C. 249.
(3) Law Rep. 3 H. L. C. 263.

entered into by or on behalf of a body corporate that such contract is ultra vires, i.e. one into which the corporation, even with the assent of all its members, cannot legally enter, such contract must necessarily be invalid. . . . There is an important difference between incorporated and unincorporated companies, for whilst it is competent for all the shareholders of an unincorporated company to depart from the agreement entered into by each with the others, it is not competent for all the shareholders of a company incorporated by charter or statute to do anything contrary thereto; nor can a corporate body be estopped by deed or otherwise from shewing that it could have had no power to do that which it purports to have done." It was argued also that the case of the *Phosphate of Lime Co.* v. *Green* (1), in which it was held (the company having been constituted under the Companies Act, 1862) that arrangements made by the directors of a company which were expressly forbidden by the articles of association, and therefore ultra vires, might be rendered binding by the subsequent assent and acquiescence of all the shareholders, was distinguishable from the present one; on the ground that what was there done was merely in contravention of the articles of association, but not inconsistent with the conditions of the memorandum, there being power under s. 50 of the Companies Act, 1862, to alter the articles, to an extent not permitted as to the memorandum, by means of a special resolution; and that what was done therefore was within the competency of the company, though done irregularly.

On the other hand, it was contended on behalf of the plaintiff, that the memorandum of association and the articles must be read together, and that the statement in the former of the objects of the company must be qualified by article 4, giving power by means of a special resolution to extend the company's business to other objects and purposes than those described in the memorandum; and that, if thus construed, the contracts in question were within the competency of the company, and that at all events they were, upon the authority of *Spackman* v. *Evans* (2), and the other cases following it, capable of ratification with the assent of all the shareholders.

The point does not appear to have been taken by the defendants in the court below, nor does the attention of that court appear to

(1) Law Rep. 7 C. P. 43. (2) Law Rep. 3 H. L. C. 171.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

have been directed to the express provisions of s. 12 of the Companies Act, 1862, prohibiting, with the exceptions already mentioned, any alteration in the conditions of the memorandum of association, or to the difference between the provisions of the Companies Act, 1862, and those of 7 & 8 Vict. c. 110, which contains no express prohibition of an alteration after registration of the business or objects of the company; and it was assumed by Channell, B., and indeed by all the learned barons, and regarded as material to the question of ratification, that under the 4th of the articles of association means were (as expressed by Channell, B.) "provided for formally extending the business of the company so as to include the contract with the plaintiff."

It appears to me, however, that the memorandum of association and the articles are, by the Companies Act, 1862, treated as distinct, and that the memorandum cannot be so qualified by the articles as to reserve powers to extend or change the business or objects of the company by means of a special resolution.

The subsequent Act of 30 & 31 Vict. c. 131, amending the Companies Act, 1862, extends by s. 8 the power to modify the conditions contained in the memorandum of association, so far as to render unlimited the liability of its directors or managers, or of the managing director; but the circumstance that, in extending the power of modifying the memorandum of association, such power is only given to a limited extent furnishes, to my mind, a strong argument that the legislature intended that the operations of the company and its capacity to contract in its corporate character should be unchangeably fixed and restrained by the terms of the memorandum, and that the articles, with the exceptions specified in ss. 12 and 13, are to be subject to or in entire consistency with the memorandum. If so, then, as the contracts in question are not such as were contemplated by the incorporation of the company, and are in excess of its statutory powers, they must be void, unless they are such as can be rendered valid by the assent of all the shareholders: see *Society of Practical Knowledge* v. *Abbott* (1); *Bagshaw* v. *Eastern Union Ry. Co.* (2); *Coleman* v. *Eastern Counties Ry. Co.* (3); *East Anglian Ry. Co.* v. *Eastern*

(1) 2 Beav. 559. (2) 7 Hare, 114.

(3) 10 Beav. 1.

Counties Ry. Co. (1); *Mayor of Norwich* v. *Norfolk Ry. Co.* (2); *Taylor* v. *Chichester and Midhurst Ry. Co.* (3)

Is there authority, then, that in such a case as the present the assent of all the shareholders can render the contracts valid as contracts of the corporation? The case of *Spackman* v. *Evans* (4) and the other cases following it in the House of Lords are relied on as authorities to that effect; but there are differences between the provisions of the Companies Act, 1862, and those of 7 & 8 Vict. c. 110, which may well justify the distinction contended for by the defendants between the case of companies constituted under that Act and of companies under the Act of 1862, and account for the view taken by the House of Lords as to the power of all the shareholders to ratify a contract ultra vires of the directors, and apparently beyond the scope of the incorporation; but, at all events, I think the fact that there are no such prohibitory words in 7 & 8 Vict. c. 110, as are to be found in s. 12 of the Companies Act, 1862, and that the effect of such prohibitory words therefore was never considered by the House of Lords, is of itself sufficient to show that the view taken in those cases is not necessarily binding in the present one.

The 7th section of 7 & 8 Vict. c. 110, requires that companies constituted under it should be formed by a deed setting forth among other things the business or purpose of the company, and by s. 25, on obtaining a certificate of complete registration, the shareholders are to be incorporated for the purposes of the trade or business for which the company was formed, according to the provisions of the Act and of the deed; but s. 7 also gives the power of registering a further or supplemental deed if not repugnant to the Act, for the purpose of supplying any omission or defect as regards the matters required to be set forth in the deed of settlement, and under such a supplementary deed such alterations in the mode of dealing with the forfeiture of shares might have been adopted as were the subject of the contracts made in the case of the Agriculturists' Cattle Insurance Company, out of which *Spackman* v. *Evans* (4) and the other cases which followed it arose. Upon this view, therefore, 7 & 8 Vict. c. 110 provided means for

(1) 11 C. B. 775; 21 L. J. (C.P.) 23.
(2) 4 E. & B. 397.
(3) Law Rep. 2 Ex. 356.
(4) Law Rep. 3 H. L. C. 171.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

formally giving effect to the contracts which were asserted to have been ratified in those cases.

It is true that this distinction was not adverted to in those cases, but there was no occasion to institute any comparison between the two acts, or to put any construction on the Act of 1862. But in *Dent's Case, In re the Anglo-Moravian Hungarian Junction Railway Co.* (1), decided by Lord Chancellor Selborne since the argument in this case, it was held that, under the Companies Act, 1862, articles of association professing to confer authority to modify the memorandum beyond the limited extent allowed by the Act are void, and the necessity of a rigid adherence to the directions of the Act is insisted on. The Lord Chancellor says in giving judgment, "We must not forget the important change made by the Act which introduced limited liability. Before that Act, partners in a trading partnership could not prescribe a limit to their liability. In favour of the shareholders the legislature permitted a limit to be placed on the liability, but it prescribed the means by which alone this could be done, and those means must be exactly adhered to; and the Act expressly says that it must be done by the memorandum of association. "Then the 23rd section of the Act provides that any subscriber of the memorandum shall be deemed to have agreed to become a member of the company, and shall be entered as a member on the register; and the 38th section provides, that the members of the company shall be liable for no more than the unpaid portion of their shares. All these provisions have reference to the memorandum by which the shares are to be limited. In the present case, the memorandum mentions the limit of the shares; and the effect of a person subscribing the memorandum was to make him liable for 20*l.* on each share, and in some way or other he must pay it. That was laid down expressly in the case decided by Lord Justice Giffard, *In re Baglan Hall Colliery Co.* (2), who said that if there were in that respect a contradiction between the articles and the memorandum, the articles must give way. . . . . Then the 12th section of the Act provides, that the conditions contained in the memorandum of association may be modified to a limited extent if the articles authorize it. But that could only be

(1) Law Rep. 8 Ch. Ap. 771. (2) Law Rep. 5 Ch. Ap. 346.

done (I am speaking of the law as it stood at the time when the question in this case arose) by the increase of capital or the consolidation or division of stock; and then the clause goes on, 'but save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association.' It is quite certain that under that clause, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void."

The privilege of contracting as a corporation and with a limited liability is conferred, only subject to the express directions and limitations of the Act, of which it seems to me to be the policy as well as the true construction, to ignore (so to speak) the existence of the corporation and the power of the shareholders, even when unanimous, to contract or act in its name for any purpose substantially beyond or in excess of its objects as defined by the memorandum of association; but if the business of a company as thus defined could be extended or altered by the consent of all the shareholders, notwithstanding the express prohibition of s. 12, there would be an easy means of acquiring exceptional privileges whilst completely evading the Act.

A company registered for one purpose would practically obtain powers to carry out in its corporate name and character, and with a limited liability on the part of the shareholders, objects entirely different, and might undertake business or contracts altogether at variance with its object as set forth in the registered memorandum, without any notice whatever to the public. The shareholders in such a company might of course change from day to day, and persons buying shares, or even entering into contracts on the faith of the registered memorandum, might find all the funds of the company already pledged for totally different objects. Of course the individual shareholders assenting would have no just ground of complaint, but the fact that their acts might thus operate to the prejudice of strangers subsequently acquiring shares, or contracting with them on the faith of the registered documents of the company, goes far to prove to me that though all join in a contract

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

beyond the competency of the company, the contract cannot be regarded as a contract by the corporation, but must be dealt with as one binding the shareholders, if at all, merely as individuals and not in their corporate capacity.

I admit that at common law (as was resolved in the case of *Sutton's Hospital* (1)), when a corporation is duly created all other incidents are tacite annexed, such as ability to purchase and alien, to sue and be sued, and to use what seal they will; and that even a clause in their charter restraining them from aliening or demising but in a certain form, though an ordinance testifying the desire of the Crown, is to be deemed but a precept and not binding in law, so that a corporation thus constituted acquires rights of contracting as extensive as those of a natural person; but the question under consideration has reference to the creation of corporations by statute with a limited scope and objects, and to the true construction of the statute law in regard to such bodies, a question which depends necessarily to a great extent, where the legislative provisions are not unmistakeably clear and express the other way, on the general policy of such legislation.

No doubt, as observed by Lord Cranworth (*Shrewsbury and Birmingham Ry. Co.* v. *North Western Ry. Co.* (2)), when the legislature constitutes a corporation it gives to that body primâ facie an absolute right of contracting. But he goes on to say, "that this primâ facie right does not exist in any case where the contract is one which, from the nature and objects of the incorporation, the corporate body is expressly or impliedly prohibited from making."

Adopting this view, what can rebut more strongly the presumption of a primâ facie general authority to contract than an express provision that the scope and objects of the company, as originally declared by its memorandum of association, shall be unchangeable, and in effect, therefore, that its corporate capacity shall exist only within the limits and for the purposes thus defined?

This argument is rendered more cogent by the consideration that the registered memorandum is notice to the public of the purposes for which alone the corporation exists, and of the scope of its powers; and that, in the case of a registered company, those who contract with it must be taken to have read its registered

(1) 10 Co. 30 b. (2) 6 H. L. C. at p. 135; 26 L. J. (Ch.) at p. 493.

3 Jur. N. S. 775, 781.

documents, and to be aware of any restrictions imposed by them on its capacity to contract: *Royal British Bank* v. *Turquand.* (1)

As to contracts substantially beyond its scope and objects, I prefer to regard the case as one of incapacity to contract, rather than of illegality, and the corporation as if it were non-existent for the purpose of such contracts. If, then, I am correct in this view, how can the individual assents of all the shareholders be sufficient to affirm or give validity to a contract which is beyond the scope and objects of the memorandum, so as to render it a contract of the ideal legal body, which exists only as a corporation, and with powers and capacity which are thus admittedly exceeded?

I am unable to agree with my late Brother Channell, that it is settled by the more recent authorities that shareholders in a company registered under the Act of 1862 may bind themselves in their corporate capacity by their individual assents to contracts not authorized by the memorandum of association. I cannot regard the cases of *Spackman* v. *Evans* (2), *Evans* v. *Smallcombe* (3), and *Houldsworth* v. *Evans* (4), as authorities to that effect; and I know of none others which can be so regarded. They may well do so with respect to any matter as to which they would have power under the Act (if it were done formally) to make an alteration in the memorandum or in the articles of association, but not otherwise; and I think that the distinction suggested on this ground by the counsel for the defendants between this case and that of the *Phosphate of Lime Co.* v. *Green* (5) is a sound one. In that case an alteration, which it was competent to them to have made, in the articles of association would have enabled the company to have done in a formal manner what was done informally by the assent of all the shareholders. But as the contracts in question here are to my mind clearly and entirely beyond the scope of the memorandum or of any alteration that could be made in it, and therefore beyond the scope of the incorporation, I have arrived at the conclusion that they are incapable of ratification so as to bind the body corporate.

But even if capable of ratification, have they been in fact rati-

(1) 6 E. & B. 327. 2 Jur. N S 664 (3) Law Rep. 3 H. L. C. 249.
(2) Law Rep. 3 H. L. C. 171. (4) Law Rep. 3 H. L. C. 263.
(5) Law Rep. 7 C. P. 43.

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

fied by the assent, express or implied, of all the shareholders? Though there were differences of opinion as to the facts and their effect in the three decisions in the House of Lords—*Spackman* v. *Evans* (1), *Evans* v. *Smallcombe* (2), and *Houldsworth* v. *Evans* (3), it was assumed in all that in order to the ratification of a contract ultra vires there must be the assent, express or implied, of every shareholder. It must be taken also, as stated by Willes, J., in *Phosphate of Lime Company* v. *Green* (4), that the ratification to be binding must be either with full knowledge of the character of the act to be adopted, or with an intention to adopt it at all events.

In dealing with this question I think we should be guided also by the considerations mentioned by Lord Cranworth in the case of *Houldsworth* v. *Evans* (5), and referred to by my Brother Bramwell in his judgment, viz. "that in these joint-stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty, except in cases where they are informed that, although the directors have not intended to defraud the company, yet, exercising powers not legally conferred upon them, they have gone beyond what they ought to do." It seems to me equally reasonable that absent shareholders should not be bound to assume that those who attend a meeting will ratify acts of the directors in excess of their powers, unless they have express notice that the shareholders will be invited to do so.

But, applying these rules to the facts of this case, how does the matter stand? As far as appears, the first information to the shareholders, as already mentioned, that any portion of the company's funds had been advanced or applied towards contracts in connection with the Belgian railway was in the balance sheet of the 5th of September, 1865, which was circulated with the letter of the secretary of the 27th of November, 1865, convening the meeting of the 5th of December, and announcing that the meeting would be required to declare a dividend out of the balance shewn by the balance sheet. But the form in which these advances are

(1) Law Rep. 3 H. L. C. 171.
(2) Law Rep. 3 H. L. C. 249.
(3) Law Rep. 3 H. L. C. 263.
(4) Law Rep. 7 C. P. 43.
(5) Law Rep. 3 H. L. C. at p. 276.

entered in this and subsequent balance sheets until the meeting at which an arrangement was made with the directors, is quite consistent with advances having been made on contracts intra vires; and I am of opinion that it conveyed no sufficient information to the shareholders that anything had been done by the directors in excess of their power. From the strong observations made at the meeting of the 5th of December, it must be presumed that the facts as to the Belgian contracts were at all events to some extent made known to the shareholders present; yet, comparing the list and numbers of shareholders present with those who attended subsequent meetings, I have no hesitation in arriving at the conclusion that all were not present, and that whatever the effect of the approval and adoption of the accounts by that meeting (though I do not think it had any greater effect than that attributed to it by my Brother Bramwell in his judgment), it did not amount to a ratification of the Belgian contracts by all the shareholders.

As regards the subsequent meeting, after a careful consideration of the evidence in the appendix, and giving full effect to the circulars by which the meetings were convened and to the form in which the accounts were presented, I find nothing up to the meeting of the 1st of May, 1867, which conveyed to the shareholders any full or accurate information as to what had been done by the directors. The report of the committee of investigation presented at that meeting, did so, no doubt, to all who attended; and I think the subsequent circular of the 6th of May, 1867, convening the meeting on the 14th, was calculated to put the shareholders on inquiry, which, if made, would have put them in possession of all the facts up to that time. They would have become acquainted with the fact that the Belgian contracts had been entered into by the directors in the name of the company, and that on the ground that they were ultra vires the directors were considered liable to repay to the company the amount which had been advanced out of the company's funds, and that the committee of inquiry had recommended an endeavour to effect an amicable settlement with the directors without having recourse to legal proceedings, but nothing more.

But if with such knowledge, or means of knowledge, any shareholder omitted to attend the meeting of the 14th of May, 1867,

1874

RICHE v. ASHBURY RAILWAY CARRIAGE CO.

or to protest against any agreement with the directors short of their doing exactly what they might have been compelled to do by means of hostile proceedings in a Court of equity, can it be said that he intended to sanction whatever might be done at the meeting at all events, or to constitute the other shareholders his agents to make the arrangement which was adopted at that meeting, and afterwards carried out by the deed. If he did, I think the adoption of the concession would amount also to an adoption of the contracts with the plaintiff, for I agree that the two were inseparably connected, the directors having accepted the transfer subject to the contract with the plaintiff. But I cannot see on what principle he can be held to have done so, or that he was bound to take any step before this action was brought to signify his dissent. The case unfortunately does not state whether all the shareholders were present at the meeting of the 14th of May, 1867; and although a comparison of names and numbers in the case of other meetings leads to a conclusion that all were not present at some, at least, of those meetings, it is impossible by any such means to arrive at any conclusion either way as to the meeting in question. (1) But the burden is on the plaintiff to make out the ratification, which would not on any principle be complete without the assent of all the shareholders, and in the absence of proof that all the shareholders were present and assenting, the ratification is not established. As regards the subsequent meeting of the 24th of December, 1867, I infer that there were shareholders who did not attend; and as the substance of the arrangement subsequently embodied in the deed was adopted by those present at the annual general meeting of the 14th of May, and was (so to speak) a fait accompli, I cannot understand on what principle any shareholders who were not then present, and were not bound by that arrangement, should lose their right to dispute it by failing to attend and express their dissent on the 24th of December. If the attendance

(1) There was no statement of the number of shareholders in the company. The numbers present at the various meetings (exclusive of directors) were as follows: on the 5th of December, 1865, twenty-five; on the 20th of December, 1866, thirty-six; on the 1st of May, 1867, thirty-six; on the 14th of May, 1867, forty; on the 24th of December, 1867, twenty; but some names which appeared at other meetings did not appear on the minutes of the 14th of May, 1867.

and assent of all had been proved I should feel, no doubt, that the arrangement embodied in the deed was an adoption of the concession, and, as a consequence, of the contract with the plaintiff, for I concur in the view expressed by my late Brother Channell in his judgment, that the deed which confers on the directors a right to transfer the contracts presupposes an election to take them, and not to treat them as void; and I think those parts of the deed by which the purchasers undertake to indemnify the company, and which declare that the deed is not to be taken as precluding the company from maintaining and alleging, if so advised, that the contracts were ultra vires, make no difference in this respect. They would have their effect as between the company and the purchasers, but they cannot, in my opinion, qualify the operation of the deed as a ratification so far as the plaintiff is concerned.

If, therefore, it had been competent to the shareholders to have ratified, and all had assented to the arrangement made on the 14th of May, 1867, the plaintiff would, in my opinion, have been entitled to recover. But as I think there is no proof of such assent by all the shareholders, and still more on the ground that the contracts under the circumstances were wholly incapable of ratification, I am of opinion that the question submitted in the case must be answered in the negative, and that the judgment of the Court of Exchequer should be reversed.

Judgment affirmed.

Attorney for plaintiff: *Wilkinson.*
Attorney for defendants: *Skynner.*

1874
June 11.

SKINNER *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Discovery—Inspection—Privileged Documents—Reports by medical Men.

Where an accident occurs on a railway, and the officials of the company in the course of their ordinary duty make a report to the company, whether before or after action brought, the report is not privileged. But when a claim has been made, and the company seek to inform themselves by a medical examination as to the condition of the person making the claim, the report made to them is privileged.

Cossey v. *London, Brighton, & South Coast Ry. Co.* (Law Rep. 5 C. P. 146) followed.

RULE to vary an order for inspection, made at chambers by Keating, J., in an action brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the defendants' negligence, whilst he was travelling as a passenger on their line.

The documents of which inspection was ordered comprised, amongst others, two reports, dated respectively the 15th of December, 1873, and the 4th of February, 1874, made to the defendants by Mr. Jackson, their medical officer, after examining the plaintiff. The examinations to which the reports referred were held, and the reports were made, before any action had been commenced or any communication made by the plaintiff's attorney, but after a claim for compensation had been made by the plaintiff and in consequence of that claim. The rule was to vary the order by excluding these reports.

On moving the rule, *F. M. White* referred to a case of *Malden* v. *Great Northern Ry. Co.* (1)

Pritchard shewed cause. The decisions in the Courts of Queen's Bench and the Common Pleas, with respect to this class of documents, are not altogether consistent; in this Court there is no reported decision.

[BRAMWELL, B. The distinction is this; where an accident happens, and the officials of the company in the course of their ordinary duty, whether before or after action brought, make a

(1) Note, post, p. 300.

report to the company that report is subject to inspection; but where a claim has been made, and the company seek to inform themselves by a medical examination as to the condition of the person making the claim, inspection of that report is not granted; that practice has been constantly followed in this Court.]

In *Fenner* v. *London & South Eastern Ry. Co.* (1), which was a considered judgment, and is the latest case on the subject, a wider rule was adopted, and it was laid down that a document of this nature is not privileged unless it is in the nature of instructions for the brief, which the judge will ascertain by examination of the document itself. That rule was acted upon in the present case by Keating, J., who perused the reports before he made the order for their inspection. That rule is not inconsistent with *Woolley* v. *North London Ry. Co.* (2) It must be admitted that the rule acted on in the later case of *Cossey* v. *London, Brighton and South Coast Ry. Co.* (3) would exclude these reports; but *Fenner* v. *London & South Eastern Ry. Co.* (1) is later than both these cases, and was decided after a full consideration and review of them and of numerous other authorities.

F. M. White was not called on to support the rule.

BRAMWELL, B. We have to choose between the decision of the Queen's Bench and that of the Common Pleas, and we follow the latter, which is in conformity with the practice of this Court. The rule must be made absolute.

PIGOTT, B. The case of *Cossey* v. *London, Brighton and South Coast Ry. Co.* (3) lays down a clear, broad, and intelligible principle, which there is no difficulty in acting upon; but if that is departed from, and the matter is made to turn upon the discretion of the judge, there can be no certainty in the practice.

CLEASBY and AMPHLETT, B.B., concurred.

Rule absolute.

Attorney for plaintiff: *Gammon.*

Attorneys for defendants: *Johnston, Farquhar, & Leech.*

(1) Law Rep. 7 Q. B. 767. (2) Law Rep. 4 C. P. 602.
(3) Law Rep. 5 C. P. 146.

1874
Jan. 29, 30.

MALDEN *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Rule to vary an order for inspection of documents made by Martin, B., in an action to recover damages for personal injuries sustained by the plaintiff in an accident on the defendants' line, which happened on the 10th of October, 1871.

The plaintiff was attended by a Mr. Stevens. At his suggestion Mr. Jackson, the medical officer of the company, was called in; he met Mr. Stevens in consultation on the 30th of October, the 15th of November, and the 5th of December, and on the 20th of November and the 5th of December reports were made to the company by Mr. Jackson.

At the request of the company Mr. Erichsen examined the plaintiff in conjunction with Mr. Stevens and Mr. Jackson on the 3rd of January, 1872; on the 5th of January a short report of the examination was sent to the company signed by all three; and, on the 6th of January, a further and more detailed report was made to the company by Mr. Erichsen alone.

At this time no claim had been formally made on the company, nor had they had any communication with the plaintiff's attorney, whose first letter to the company, complaining of the consultation of the 3rd of January having been held without communication with him, was written on the 4th of January; but it was admitted that it was understood the company were responsible to the plaintiff.

On the 10th of April, 1872, another consultation was held between Messrs. Stevens, Jackson, and Erichsen, of which a report was on the same day sent to the company by Mr. Jackson.

The writ was issued on the 11th of December, 1872; the defendants paid 40s. into Court.

An order had been made at chambers by Martin, B., for the production of documents, including amongst others the above-mentioned reports, and several letters which passed between the defendants' attorney and Messrs. Jackson and Erichsen subsequently to the issuing of the writ on the 11th of December, 1872.

A rule having been obtained by *Sir J. B. Karslake, Q.C.*, to vary the order by omitting these documents,

Murphy, Q.C., shewed cause, and relied on *Fenner* v. *London & South Eastern Ry. Co.* (1)

[In reference to the letters between the defendants' attorneys and Messrs. Jackson and Erichsen,

Blackburn, J., said. If it appears that there is a letter from the attorney in a cause to a man who may very probably be called as a witness at the trial, that letter being written after the litigation had commenced (which is the case with all these letters), is it not primâ facie a privileged communication unless you shew some reason to the contrary?

Murphy, Q.C., abandoned all documents written after the claim was actually made.]

(1) Law Rep. 7 Q. B. 767.

1874

MALDEN v. GREAT NORTHERN RAILWAY CO.

F. M. White supported the rule and, as to the reports, relied on *Cossey* v. *London, Brighton and South Coast Ry. Co.* (1)

[QUAIN, J. Confidential communications are not necessarily privileged; but if they are made, not only as confidential communications, but with the view to or in the contemplation of a litigation they are privileged.]

In giving judgment,—

BLACKBURN, J., said. We adhere to the principles we laid down in the case of *Fenner* v. *London & South Eastern Ry. Co.* (2); the difficulty is in the application of those principles. Letters written by gentlemen who may be called as witnesses to the defendants' attorneys, and letters from the defendants' attorneys to them are not necessarily privileged; but primâ facie they are, and no case has been made here that would entitle us to order their production.

Then there is a report of a consultation that was held when the three medical gentlemen, Mr. Jackson, Mr. Stevens, and Mr. Erichsen, met and saw the patient. Mr. Stevens who certainly was, or ought to have been, according to the facts as they appear to us, purely the physician or surgeon of the patient, the plaintiff; Mr. Jackson, who was in that double situation that he was the surgeon of the patient endeavouring to cure him, but at the same time employed by the railway company, and who could, without any breach of faith, give the company any information; and Mr. Erichsen, who, as far as he was concerned, appears to have been told that he was going down there for the company in order to make a report to them as to the state of the patient for their information and guidance. No information was given beforehand to the plaintiff's attorney, nor, as it appears, to the patient's friends, that the meeting was going to be held. Nothing seems to have been said to him, and, so far as I see from the facts, he appears to have supposed that Mr. Erichsen was coming there, as Mr. Jackson did, to advise upon his treatment, and to see what was the best that could be done.

Now we are agreed upon this; that if a medical man is sent down to examine a patient and to report to a company, and it is done with such a warning to the patient's friends who are acting for him in the matter, or to his attorney if he has one—if it is done under such circumstances that there is a contract actually made that the doctors are to come and see the man, and have a fair examination and report to the company, and that report is to be for their guidance and is confidential, then undoubtedly we should not order them to produce it; and where the circumstances are such, from the plaintiff's attorney being concerned in it, that it may be implied, although not expressly said, that such an agreement was understood, I should say the same thing. The difficulty of implying an understanding is considerable, unless there is an attorney concerned in the matter, who would know what was the usual practice; and if the company choose to let it rest on an understanding and implication, they must run the risk of having litigation to see whether it is implied or understood. In the present case I should come to the conclusion that it was not. Mr. Stevens seems to have arranged the matter, he clearly not being an agent of the patient for any such purpose as that.

Then arises the question, is the thing in itself such a matter as would be

(1) Law Rep. 5 C. P. 146. (2) Law Rep. 7 Q. B. 767.

1874

MALDEN v. GREAT NORTHERN RAILWAY CO.

privileged within the rule of *Fenner* v. *London & South Eastern Ry. Co.* (1)? And it happens that in this case there are two reports; one is dated the 5th of January, it is a short abstract of what the medical men do, which is sent to the company and signed by all three; that the plaintiff is clearly entitled to see, and it really conveys all that is material in the long letter to the company signed by Mr. Erichsen alone. That being so, there is no object in the longer report being pressed for, and it has been waived: we need not, therefore, decide whether it is privileged or not.

As to the other documents, the letters of the 20th of November, the 5th of December, and the 5th of January, it rests upon the defendants to establish affirmatively that they are privileged, and I think they have totally failed in doing so. Mr. Stevens and Mr. Jackson were not in any way witnesses; they were persons who were attending the patient as medical men, and they gave information to the company about his state, and the information which they gave the plaintiff is fairly entitled to see, and it comes within no ground of privilege.

QUAIN and ARCHIBALD, JJ., concurred.

A question subsequently arose as to the report of the 10th of April from Mr. Jackson to the defendants' attorneys, which was pressed for by the plaintiff; but the Court, after examining the document, held it to be privileged.

Rule discharged as to the documents of the 20th of November, the 5th of December, and the 5th of January. Absolute as to the rest.

Attorneys for plaintiff: *Hooper, Raynes, & Co.*
Attorneys for defendants: *Johnston, Farquhar, & Leech.*

June 25.

ANDREWS *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF RYDE.

Corporation acting as Local Board—Local Government Act, 1858 (21 & 22 *Vict. c.* 98) *s.* 24—*Seal.*

8 Ch. Ch. 519.

The defendants, a municipal corporation, having, by transfer from a body of commissioners, power to purchase certain gas works, and being also a local board, took proceedings for the purpose of purchasing the works and assessing the price by arbitration. In pursuance of a resolution passed at a meeting of a sub-committee appointed for the management of the business, the report of which was adopted by the council, the plaintiff was employed as a witness on the arbitration to support the evidence of the defendants' valuer. No appointment of the plaintiff under seal was made, but he acted as witness under the instructions of the valuer, who was so appointed.

In all these proceedings the defendants erroneously described themselves as

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(1) Law Rep. 7 Q. B. 767.

"acting as the local board," and their seal as "the seal of the local board;" but it did not appear that the seal of the local board was any other than the municipal seal.

In an action brought by the plaintiff against the corporation for his services as witness:—

Held, that the municipal corporation and the local board could not be treated as independent bodies; that the plaintiff's contract was in substance with the corporation; and that he was entitled to recover.

SPECIAL case stated in an action brought to recover a sum of 194*l.* claimed to be due from the defendants to the plaintiff for work and labour as a professional witness.

By the Ryde Improvement Act, 1854, a body of improvement commissioners was incorporated, with power to purchase the property of the Ryde Gas Company, which was a company registered under 7 & 8 Vict. c. 110.

On the 17th of October, 1859, the commissioners, by resolution, adopted the Local Government Act, 1858 (21 & 22 Vict. c. 98).

By the Ryde Gas Act, 1866, certain statutory powers were obtained by the company, the Act preserving the power of the commissioners to purchase the gas works, provided the power were acted upon within five years.

The defendants were incorporated by charter on the 23rd of July, 1868, and on the election in November of the mayor, aldermen, and councillors, they became, by virtue of 21 & 22 Vict. c. 98, s. 24, the local board.

On the 15th of December, 1868, the commissioners passed a resolution to transfer to the corporation, and the corporation passed a resolution to accept, and the commissioners executed (under 20 & 21 Vict. c. 50, s. 2) a deed poll under their common seal, transferring to the corporation all their "rights, powers, estates, property, and liability."

On the 14th of February, 1871, at a quarterly meeting of the town council "acting as the Ryde local board," it was resolved that notice should be given to the gas company to treat for the purchase of the gas works, and notice was given accordingly; and the company, in pursuance of this notice, gave to the defendants particulars of their interest and claim.

On the 24th of April, at a special meeting of the council "acting

1874

ANDREWS v. MAYOR, &C., OF RYDE.

as the Ryde local board," it was resolved that the "seal of the board" be affixed to the appointment of Mr. Stevenson "as valuer on behalf of the corporation," and the seal was affixed accordingly; and it was further resolved that "the gas sub-committee appointed by the local board on the 19th inst. should be further entrusted with the management and conduct of the business necessary for the completion of the purchase of the Ryde gas works (except the appointment of solicitor and arbitrator), and to report thereon from time to time to the board."

At a special meeting of the council, "acting as the Ryde local board," held on the 16th of May, Messrs. Hearn and Fardell were appointed solicitors in the management of the purchase.

Mr. Stevenson proceeded to act under his appointment, but he desired that other witnesses should be employed to support his valuation; and the sub-committee, at a meeting held on the 16th of June, resolved that it be recommended to the board (amongst other things) that Mr. Cawley should be appointed arbitrator, and that certain persons, amongst others the plaintiff, should be selected as witnesses in support of Mr. Stevenson's valuation.

On the 20th of June at a meeting of the council acting as a "special meeting of the local board," the report of the sub-committee was presented, and was received and adopted; and it was resolved that "the seal of the local board be affixed to the appointment" of Mr. Cawley "as arbitrator on behalf of the local board," and to a notice to the gas company of such appointment, and the seal was affixed accordingly.

The gas company subsequently appointed their arbitrator, and the arbitrators appointed an umpire.

The plaintiff was, in accordance with the above-mentioned resolution, instructed by Mr. Stevenson, and attended and gave evidence on the arbitration, but no appointment under seal was made.

An award was subsequently made, the validity of which was disputed by the defendants, on the ground that it included property which they had not power to purchase.

May 4. *Cole, Q.C.* (*Michael* with him), for the plaintiff, after stating the case, was stopped by the Court.

Manisty, Q.C. (*Pinder* with him), for the defendants, contended that the defendants had in all their proceedings acted as the local board; the corporation, as such, had never contracted with the plaintiff, and could not therefore be sued; and, on the other hand, if the corporation were now sued by the plaintiff as the local board, he could not recover, because the local board had no power to purchase the gasworks or enter into the arbitration; the corporation only possessing this power by transfer from the commissioners.

Cole, Q.C., in reply, referred to *Nowell* v. *Mayor of Worcester*. (1)

Cur. adv. vult.

June 25. The judgment of the Court (Bramwell and Pollock, BB.) was delivered by

POLLOCK, B. [after stating the facts of the case, and observing that it was not stated in the case that the seal of the local board was any other than the corporate seal of the borough, and that it was, for the reasons afterwards given, to be assumed that it was the corporate seal, the learned judge proceeded:—] Under these circumstances it seems clear that the employment of the plaintiff was de facto by the corporation acting as the local board, and the only question is whether the corporation and the local board can for this purpose be treated as independent bodies, so as to enable the corporation successfully to contend that the plaintiff having been retained by and rendered services to the corporation acting as the local board, his remedy must be against the local board, or specifically against the corporation acting as local board.

There would be great force in this contention, if it could be shewn that the effect of the statute, by which alone the local board is created, was to establish a separate body. This, however, does not seem to be the case. The provision of the Local Government Act, 1858 (21 & 22 Vict. c. 98, s. 24) is as follows: "The duty of carrying into execution this Act shall be vested in a local board; and such local board shall be, 1. In corporate boroughs, the mayor, aldermen, and burgesses acting by the council." This does not create a new separate body, or provide for an independent seal or

(1) 9 Ex. 457; 23 L. J. (Ex.) 139.

1874

ANDREWS v. MAYOR, &C., OF RYDE.

independent power of contracting, but in substance enacts that, in corporate boroughs, the corporation shall be the local board; and if so, then, whether, in contracting, the name and style of the corporation is used or that of the corporation acting as the local board, the essential body and contracting party is the corporation; or, to put the proposition in another form, the local board has no existence, and there could be no contract with them, unless by the local board is intended the corporation, who, according to the Act, are the local board.

Under the circumstances, we think that, though the local board was erroneously mentioned, the contract, in substance, was with the corporation, and, therefore, that they are properly made defendants in this action.

The case of *Nowell* v. *Mayor of Worcester* (1), to which we were referred by the plaintiff's counsel, is not a direct authority in support of this view, because there the corporation had contracted with the plaintiffs under the corporate seal, but the judgment of the Court, and especially that of the Lord Chief Baron, when he says "the statute, in forming this body into a local board of health, intended that they should contract as a municipal corporation," accords in principle with the view we now take.

The conclusion at which we had arrived renders it unnecessary to consider objections which were raised against the plaintiff upon the hypothesis that the cause of action and judgment ought to be looked upon as arising against and binding upon the local board, treating it as a body having an existence other than that of the corporation, and therefore we do not further refer to them.

For the reasons given, our judgment is for the plaintiff.

Judgment for the plaintiff.

Attorney for plaintiff: *Hacon.*

Attorneys for defendants: *Davies, Campbell, & Co.*

(1) 9 Ex. 457; 23 L. J. (Ex.) 139. 18 Jun 64

[IN THE EXCHEQUER CHAMBER.]

1874
June 12.

KNOWLMAN *v.* BLUETT.

Statute of Frauds, s. 4—*Agreement not to be performed within a Year—Contract for Support of Illegitimate Children—Annuity—Executed Consideration.*

The defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her verbally to pay her 300*l.* per annum, by equal quarterly instalments, for so long as she should maintain and educate the children. At the time of the making of the promise the eldest child was about fourteen years old. For several years the plaintiff maintained and educated the children, and the defendant paid the agreed sums. At Michaelmas, 1870, he discontinued his payments. The plaintiff continued to maintain and educate the children, and in May, 1873, brought an action for two and a half years' arrears:—

Held, affirming the judgment of the Court of Exchequer, that, the consideration being executed, she was entitled to recover as for "money paid at the defendant's request," at the rate fixed by the verbal agreement, even assuming that the agreement was one "not to be performed within a year."

APPEAL by the defendant from a decision of the Court of Exchequer refusing a rule to enter a nonsuit. (1)

Arthur Charles (*Cole, Q.C.*, and *Lopes, Q.C.*, with him), for the defendant. The contract in this case was one not to be performed within a year. There should, therefore, have been a note or memorandum in writing of it under the Statute of Frauds, s. 4.

[BLACKBURN, J. If this were an executory contract, then, as both parties appear to have contemplated its continuance beyond a year, the statute might apply; but here the plaintiff has actually maintained the children. Can you contend she is not to be paid for it?]

The consideration is executed, but the statute nevertheless applies: *Cocking* v. *Ward*. (2) Part performance by one party can only take the case out of the statute where all that is to be done by that party is to be done within the year: *Donellan* v. *Read*. (3)

[BLACKBURN, J. In *Souch* v. *Strawbridge* (4) Tindal, C.J., inti-

(1) Reported ante, p. 1.
(2) 1 C. B. 858; 15 L. J. (C.P.) 245.
(3) 3 B. & Ad. 899.
(4) 2 C. B. 808; 15 L. J. (C.P.) 170.

1874

KNOWLMAN v. BLUETT.

mates his opinion that the statute does not apply where the consideration is executed, and that case is subsequent to *Cocking* v. *Ward.* (1)]

Tindal, C.J., was a party to the considered judgment in *Cocking* v. *Ward.* (1) His dictum in *Souch* v. *Strawbridge* (2) was obiter.

[ARCHIBALD, J., referred to *Thomas* v. *Fredricks.* (3)]

There the agreement on which the plaintiff recovered was valid and there was nothing to prevent an action being brought upon it. (4) But s. 4 of the Statute of Frauds enacts that no action shall be brought unless there is a note in writing. If the plaintiff was entitled to recover as for "money paid," the amount should have been assessed by the jury.

[GROVE, J. The defendant did not ask that this should be done.]

No, because the plaintiff's case was rested, both in allegation and proof, upon the special contract.

[He also referred to the cases relied on in the Court below. (5)]

Folkard (*St. Aubyn* with him), for the plaintiff, was not called on.

BLACKBURN, J. We are of opinion that the Court of Exchequer was right in refusing a rule in this case. The bargain between the parties was that if the plaintiff would take care of and maintain the children, the defendant would pay her 30*l.* a year as long as she did so. This arrangement was never revoked, and the plaintiff having taken care of and maintained the children, now sues for arrears due to her. It is said that the action is not maintainable because there is no memorandum in writing of the bargain. But the plaintiff has performed her part of it, and it would be unjust if she could not obtain repayment of the sums she has expended. She could have maintained an action for "money paid at the defendant's request," and it would have been no answer to have said that the term in respect of which she was suing was longer than a year, and that the agreement which fixed the rate of

(1) 1 C. B. 858; 15 L. J. (C.P.) 245.

(2) 2 C. B. 808; 15 L. J. (C.P.) 170.

(3) 10 Q. B. 775; 16 L. J. (Q.B.) 393.

(4) Per Lord Denman, C.J., 10 Q. B. at p. 781.

(5) Ante, pp. 3, 4.

remuneration was one not to be performed within a year. We think that in substance her present claim is for money paid, although the declaration is in form upon a special contract.

1874

KNOWLMAN v. BLUETT.

KEATING, MELLOR, LUSH, GROVE, and ARCHIBALD, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Wedlake & Letts, for Edmonds & Son, Plymouth.*

Attorneys for defendant: *Le Riche & Son, for Carter, Torquay.*

MILL *v.* HAWKER AND OTHERS AND WICKETT.

June 4.

Trespass—Highway Board—Surveyor—Individual Corporators—Personal Liability—5 & 6 Wm. 4, c. 50—25 & 26 Vict. c. 61.

The members of a highway board upon an allegation that a path across the plaintiff's field was a public highway, by a resolution passed at a board meeting, directed their surveyor to remove an obstruction placed across it by the plaintiff. The following day they gave him an order in writing to the same effect. He removed the obstruction accordingly, and the plaintiff thereupon brought an action of trespass against the members of the board who had concurred in the resolution and the surveyor. There was no evidence that the path in question was a highway:—

Held (by Pigott and Cleasby, BB., Kelly, C.B., dissenting), that the action was maintainable.

By Pigott and Cleasby, BB. First, that the resolution was unlawful altogether, inasmuch as it was beyond the province of the highway board, as a corporate body, to determine whether the path was a highway or not, and to direct the removal of an obstruction, and that the members who concurred in the resolution were therefore personally liable.

Secondly, that the circumstance that the surveyor was by 25 & 26 Vict. c. 61, s. 16, bound to obey the orders of the board did not excuse him if in obeying their orders he did an unlawful act.

By Kelly, C.B. First, that the action should have been brought against the board, the resolution and order having been corporate acts and within the competence of the board to perform, as being charged with the duty of maintaining the highways of their district in repair.

Secondly, that the surveyor, being bound by statute to obey the orders of the board, was exempt from liability as being a mere ministerial officer.

DECLARATION. Trespass by taking locks off the plaintiff's gates.

1874

MILL v. HAWKER.

Plea: Not guilty by statute (5 & 6 Wm. 4, c. 50, s. 109; 25 & 26 Vict. c. 61, s. 9).

Issue.

The cause was tried before Kelly, C.B., at the Cornwall summer assizes, 1873, when the following facts were proved:—

The plaintiff is the occupier of some land called Crapps Park, in the parish of Boscastle. Through this land there runs a path, across which the plaintiff, in August, 1872, placed gates, which he locked. On the 29th of August, at a meeting of the highway board for the Camelford district, within which the path is situated, a discussion took place as to whether it was a public way or not, and after hearing the statements of some witnesses and the attorney of the now plaintiff, the board resolved that it was a public way, and that "Mr. Mill, the tenant, and Miss Hellyar, the owner of the land through which it passes, be served with notice to remove the obstruction they have created, and if the same be not removed on or before six o'clock on the 31st instant, the district surveyor remove the same." The notices were given and disregarded, and the surveyor thereupon removed the obstruction. The plaintiff afterwards relocked the gates, and on the 29th of November, at a board meeting, a resolution was passed directing the surveyor again to remove the locks. On the following day the surveyor, who had been present at the meeting, received a letter from the clerk of the board in these terms:—

"Camelford Highway District, 30th November, 1872.

"Dear Sir,—The highway board, at their meeting yesterday, ordered that you are forthwith to remove the locks again placed on the gates across the highway leading from Boscastle Bridge to the highway leading from Boscastle to Minster Church and Lesnewth, and for the future you are to take care that no obstruction whatever, either from doors or gates being locked, be suffered to exist, and that no hindrance to the free user of the road by the public be permitted for any time to remain after you are acquainted with the attempt to close the said road.

"By order of the board. Claud. C. Hawker, Clerk.

"Mr. Wickett, Surveyor."

Mr. Wickett, on the 30th of November, in pursuance of the

resolution passed at the meeting, removed the locks. The plaintiff then commenced this action against all the members of the board who had concurred in the resolution of the 29th of November, the clerk of the board, and Wickett, the surveyor. Notice of action was given to all the defendants. No evidence that the locus in quo was a highway was given.

On its appearing that the clerk, C. C. Hawker, had taken no part in the resolution, it was admitted that he was not liable. With regard to the other defendants it was objected, at the close of the plaintiff's case, first, that the members of the board who had concurred in the resolutions were not liable individually; and, secondly, that Wickett was not liable, because he committed the trespass complained of by an order of his employers, which he was by statute (25 & 26 Vict. c. 61, s. 16) bound to obey. (1)

The learned judge was of opinion that the objections were well founded, and directed a nonsuit accordingly.

In Michaelmas Term a rule was obtained to set aside the nonsuit and for a new trial, on the ground of misdirection in this,—that the learned judge ruled that the defendant members of the board and the surveyor were not individually liable.

Jan. 30; Feb. 7. *Kingdon, Q.C.*, and *Pinder* (with them *Lopes, Q.C.*,) shewed cause. First, the members of the board are not personally liable. They acted as a corporation, both in passing the

(1) The 25 & 26 Vict. c. 61, constitutes a highway board a body corporate, and such board is (s. 11) to have all the powers, rights, duties, liabilities, capacities, and incapacities of the "surveyor" of highways under 5 & 6 Wm. c. 50, and is to be deemed "successor in office" to the surveyor (s. 43, subs. 3). No member of the board is to be made personally responsible for any "lawful act" done by him as such member (s. 9, subs. 6). By s. 17 it is enacted that the highway board of a district shall maintain in good repair the highways within that district, and that it shall be the duty of the surveyor to submit to the board an estimate of the expenses likely to be incurred in each year for that purpose. By s. 12 the board has power to appoint a district and an assistant surveyor; and s. 16 enacts that "the district surveyor shall act as the agent of the board in carrying into effect all the works and performing all the duties of this Act required to be carried into effect or to be performed by the board, and he shall in all respects conform to the orders of the board in the execution of his duties; and the assistant surveyor, if any, shall perform such duties as the board may require, under the direction of the district surveyor."

1874

MILL v. HAWKER.

resolution and in issuing the written order, and should have been sued in that capacity. The board could have been made liable in an action of trespass: *Maund* v. *Monmouthshire and Staffordshire Canal Co.* (1); *Smith* v. *Birmingham and Staffordshire Gaslight Co.* (2); *Eastern Counties Ry. Co.* v. *Broom* (3); *Yarborough* v. *Bank of England.* (4) The act which was done was not ultra vires. The board are charged with the duty of repairing the highways within their district (25 & 26 Vict. c. 61, s. 17), and for that purpose may order an obstruction to be removed. It is admitted that the defendant members acted bonâ fide. But individual corporators cannot be made personally responsible unless they acted maliciously: *Harman* v. *Tappenden* (5); or unless what they do is absolutely unconnected with any corporate purpose: *Attorney General* v. *Mayor of Liverpool* (6); *Attorney General* v. *Bailiffs of Retford.* (7)

Secondly, Wickett, the surveyor, is not liable. He is the mere ministerial officer of the board, and is bound by s. 16 of 25 & 26 Vict. c. 61, to obey their orders. His position is analogous to that of a process server of a court of justice, who is not responsible personally for a trespass committed by him in carrying out the orders of the court: *Dews* v. *Riley* (8); *Andrews* v. *Marris.* (9) Again, the principle of *Buron* v. *Denman* (10) applies. The surveyor was the servant of a public body, acting for public purposes. He is not at liberty to inquire whether any order which they give is legal or not. It is enough if it is their order. Here he not only was aware of the terms of the resolution at the meeting, but was furnished with what appeared to be a valid order of his employers signed "by order of the board" by their clerk.

Arthur Charles (with him *H. T. Cole, Q.C.*), in support of the rule. The defendants, who are members of the board, cannot shield themselves by alleging that they committed this trespass in their corporate character, unless the act was one which was within the competence of the corporation, assuming the facts to be as they

(1) 2 Dowl. (N.S.) 113.
(2) 1 A. & E. 526.
(3) 6 Ex. 314; 20 L. J. (Ex.) 196.
(4) 16 East, 6.
(5) 1 East, 555.
(6) 1 My. & Cr. 171.
(7) 3 My. & Cr. 484.
(8) 11 C. B. 434; 20 L. J. (C.P.) 264.
(9) 1 Q. B. 3.
(10) 2 Ex. 167.

supposed: Grant on Corporations, pp. 281, 547; *Taylor* v. *Dulwich Hospital* (1); *Attorney General* v. *Wilson* (2); *Rex* v. *Watson.* (3) If the act was one which the corporation could not, consistently with its constitution, have done, it was a mere pretended corporate act, for which those concurring in it are personally liable: *Sands* v. *Child.* (4) Now here, admitting that the locus in quo was a public path, the board would have had no authority, as a board, to direct the obstruction to be removed. They are the "successors in office" of the old "surveyor of highways" (25 & 26 Vict. c. 61, s. 43), and have the same powers as he had (s. 9, subs. 6). His powers are defined by 5 & 6 Wm. 4, c. 50, which moreover prescribes the mode of proceeding against any person who obstructs a highway. Without an order in writing from a justice (s. 73) he could not, as surveyor, remove an obstruction. If he did, he acted at his own peril, and had to justify himself as one of the public: *Keane* v. *Reynolds* (5); *Brook* v. *Jenney* (6); *Witham Navigation Co.* v. *Padley.* (7) The fact of his acting bonâ fide did not protect him. It only entitled him to notice of action: *Smith* v. *Hopper.* (8) The proper course therefore for the different members of the board to have pursued would have been to obtain an order for the removal of the obstruction, or to have summoned the plaintiff for wilfully obstructing the highway (under 5 & 6 Wm. 4, c. 50, s. 72), or to have preferred an indictment. Instead of adopting one of these courses they did an act ultra vires, for which the corporation as such could not have been sued: *Poulton* v. *London and South Western Ry. Co.* (9); *Green* v. *General Omnibus Co.* (10)

[KELLY, C.B. The highway board are bound, under 25 & 26 Vict. c. 61, s. 17, to see that all highways within their district are properly kept in repair. Suppose it had been reported to them that this way was out of repair, and they had directed Wickett to repair it, and for that purpose he had removed the obstruction by their orders, would it not have been within their competence to give such orders?]

(1) 1 P. Wms. 655.
(2) Cr. & P. 1.
(3) 2 T. R. 199.
(4) 3 Lev. 351.
(5) 2 E. & B. 748.
(6) 2 Q. B. 265.
(7) 4 B. & Ad. 69.
(8) 9 Q. B. 1005; 16 L. J. (Q.B.) 93.
(9) Law Rep. 2 Q. B. 534.
(10) 7 C. B. (N.S.) 290; 29 L. J. (C.P.) 13.

1874

MILL v. HAWKER.

It would not. The duty of maintaining the highways cannot confer upon them any power to remove obstructions except in the manner prescribed by the Act. Nor was there any suggestion in the present case that the defendants acted with a view to subsequently directing the repair of the footway.

Secondly, the defendant Wickett is liable. He did the wrongful act, and 25 & 26 Vict. c. 61, does not relieve him from liability. It does no more than establish the relation of master and servant between the board and himself, leaving him otherwise within the general rule that a tortfeasor cannot excuse himself on the ground that he acted as the agent or servant of another: *Stephens* v. *Elwall.* (1) The maxim respondeat superior does not apply to discharge the servant, but to charge the principal. *Buron* v. *Denman* (2) was decided upon the ground that the act complained of was an act of the State. In *Dews* v. *Riley* (3) and *Andrews* v. *Marris* (4) the defendants acted under warrants of courts of competent jurisdiction as ministerial officers. Here Wickett acted upon an illegal resolution, and his position is not altered by the circumstance that he afterwards received a written order from the clerk of the board embodying that resolution.

Cur. adv. vult.

June 4. The Court differing in opinion, the following judgments were delivered:—

CLEASBY, B. The judgment I am about to read is that of my Brother Pigott and myself. There are two questions raised in this case. A trespass was committed upon the plaintiff by taking the locks off one of his gates, and the two questions are, first, whether the defendant Matthew Wickett is liable for the trespass; secondly, whether the other defendants (except Claudius Cregan Hawker) are liable. It was admitted that the defendant Claudius Cregan Hawker was not liable. The facts were that the plaintiff had caused a gate which crossed a footway on his property at Crapp's Park to be locked. It was alleged that this was a public footway, and the subject was brought forward at a meeting of the board of waywardens or highway board of the Camelford highway district,

(1) 4 M. & S. 259.
(2) 2 Ex. 167.
(3) 11 C. B. 434; 20 L. J. (C.P.) 264.
(4) 1 Q. B. 3.

held on or about the 29th of November, 1872. The defendant Hawker was clerk of the board, and all the other defendants except Wickett were members of it, present at the meeting. The defendant Wickett was the district surveyor of the board.

It was sworn, in answer to the usual interrogatories administered by the plaintiff to the defendants, that all the defendants (except C. C. Hawker and Wickett) being present at the board meeting, directed, or concurred in directing, the defendant Wickett to remove the locks from the plaintiff's gate, and that the defendant Wickett did so on the day following the meeting by the directions of the board given at the meeting. Before the removal of the locks by Wickett he received from the clerk of the board the following letter:—

"Camelford Highway District,
"30th of November, 1872.

"Dear Sir,—The Highway Board, at their meeting yesterday, ordered that you are forthwith to remove the locks again placed on the gates across the highway leading from Boscastle Bridge to the highway leading from Boscastle to Minster Church and Lesnewth; and for the future you are to take care that no obstruction whatever, either from doors or gates being locked, be suffered to exist, and that no hindrance to the free user of the road by the public be permitted for any time to remain after you are acquainted with the attempt to close the said road.

"By order of the board. Claud. C. Hawker, Clerk.

"Mr. Wickett."

At the trial it was objected, on behalf of the defendants, that the action should have been brought against the highway board, and that the defendants were not personally liable. The learned judge who tried the cause admitted the objection, and nonsuited the plaintiff.

For the purpose of the present inquiry, the trespass having been proved and no justification proved, it must be taken that the removal of the locks was unlawful; if the objection had not prevailed, as matters stood the plaintiff would have been entitled to a verdict. With regard to the first question, viz. the liability of Wickett, it appears to us that the general rule applies, and that a servant who does an act which is unlawful cannot justify it be-

1874

MILL v. HAWKER.

cause it was done by the order of his master or employer. This rule applies as much to the servants of those who act in a public as in a private capacity.

The mere fact of persons having a public office or employment (whether created by Act of Parliament or not) does not take them out of the operation of the law and give to their acts any greater force or efficacy, or to their servants any impunity. There is an apparent exception to this in the case of sheriffs or officers of courts of justice, who are excused if the judgment and process under which they acted are subsequently reversed, and the officers are still excused if they acted in the execution of the process. The defendants relied on this exception, and cases were referred to: see judgments in *Andrews* v. *Marris* (1), and *Dews* v. *Riley*. (2) But there is no analogy between the case of the officer of a court of justice whose duty it is to give effect to the judgment of the Court which, though erroneous, cannot be called illegal if the Court have jurisdiction on the subject-matter, and a servant obeying the orders of his superior, whose orders may be legal or not, as the case may be.

It is, no doubt, a hardship that an act of obedience to the orders of a public body should involve a responsibility; but the risk is small of public bodies (which act generally under advice) doing illegal acts, and the hardship is no ground for setting aside so fundamental a rule as that the person who himself does an illegal act becomes by doing so responsible, and may be sued by the person injured without his looking any further.

There is nothing in the Act of Parliament under which the surveyor is appointed to exempt him from liability. The effect of the sections relating to the appointment of surveyor (ss. 12 and 16) is to establish the relation of principal and agent or master and servant between him and the highway board. The words of the 16th section, that he shall "in all respects conform to the orders of the board in the execution of his duties," cannot be read to mean that he shall be bound to obey the orders of the board whatever they are. Previous to this Act of Parliament, the surveyor had been authorized to act upon his own judgment, but this enactment makes it his duty to abide by the directions of the board as his

(1) 1 Q. B. 3. (2) 11 C. B. 434; 20 L. J. (C.P.) 264.

superiors in all matters relating to the repair of the roads. It is hardly reasonable to read it as importing that he is relieved from responsibility for whatever he does, provided he acts by their orders. The object is to regulate his conduct, and not to limit his responsibility to third persons.

As regards the other defendants who came to the resolution in pursuance of which the illegal act was done, a question of some difficulty arises. It is said that the resolution, having been afterwards embodied in the order signed by the clerk, became a corporate act of the highway board, and that no personal liability of the members could arise upon it. We were referred to many authorities to shew that in respect of corporate acts the individual members of the corporation cannot be sued: see *Attorney General* v. *Mayor of Liverpool* (1); *Attorney General* v. *Bailiffs of Retford.* (2) There is, indeed, an express provision to this effect as regards the members of the highway board—but it is expressly limited to lawful acts of the board—in s. 9, subs. 6, of the Highway Act, 25 & 26 Vict. c. 61. And it is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting ultra vires, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for that conclusion. And in this case, unless the letter of the 30th November prevents it from being the act of the individual, it certainly was so in point of fact, for the defendant Wickett swears, in answer to the interrogatories, that he removed the locks by the direction of the highway board given at the meeting, that is, of the 29th of November. The cases of *Taylor* v. *Dulwich Hospital* (3) and *Reg.* v. *Watson* (4), may, however, be referred to in support of the proposition that the individuals really do the act; and in the case of *Poulton* v.

(1) 1 My. & Cr. 171.
(2) 3 My. & Cr. 484.
(3) 1 P. Wms. 655
(4) 2 T. R. 199.

1874

MILL v. HAWKER.

London and South Western Ry. Co., and particularly in the judgment of Blackburn, J. (1), the difference is clearly pointed out between acts which are properly corporate acts and acts which are not, as affecting the liability of the corporation.

The question in the present case, therefore, is whether the act of causing the locks to be removed is one of those acts for which the corporate body is constituted or not. It appears to us that it is not one of those acts. The highway board have authority to do what the surveyors would do under the previous act. They have all the powers, rights, duties, liabilities, capacities, and incapacities of the surveyor (s. 11), and are to be deemed successors to the surveyor, s. 43 (subs. 3). It might be sufficient to say that in the case of a disputed footway the order to remove an obstruction could only follow upon something like a judicial act of the surveyor in determining whether there was or was not a public footpath, and he has no authority whatever to act judicially in such a matter. But a reference to the sections of the previous Act, 5 & 6 Will. 4, c. 50, would shew that the surveyor had no such power of removal. Section 72 does not apply at all, and s. 73 only enables the surveyor to remove any obstruction after he has obtained the order of a justice. In like manner, the power of a surveyor to remove encroachments is founded upon a conviction under s. 69: *Keane* v. *Reynolds.* (2) In reality, the right of a person to take the law into his hands and use force to remove an obstruction is founded upon this, that he is at the time using the highway as he is entitled to do, and that as he cannot use it without removing the obstruction, he is justified in doing so. And the precedents in pleading put it on that ground. There is no right to remove the obstruction as a retaliation upon the person who has put it there.

But a corporate body who orders the removal, and so uses force in determining a legal right, is in a different position. They do not want to use the road, and have not the justification of necessity in the exercise of a legal right; they can only justify it on the ground that they have come to the determination that the obstruction is illegal and ought to be removed, and they are not authorized to enter upon such an inquiry or form such a con-

(1) Law Rep. 2 Q. B. at p. 538. (2) 2 E. & B. 748.

clusion. It is the province of the justices to whom an application may be made to form such a conclusion.

The effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal and redress was had, the persons who had really caused the trespass would not be responsible, and the damages would be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the ratepayers, and among them, perhaps, the persons entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds intrusted to them for public purposes by proceedings which might originate in feelings which it would be most inconvenient to inquire into.

Sections 17 to 19 shew what the office of the highway board is, and that it is a corporation for a particular purpose, viz. to do what is necessary to keep the highways in repair, and the provisions in s. 18 as to certain costs resulting from applications to justices being regarded as costs of the board in repairing the highway, and paid accordingly, shew conclusively to our minds that the damages and costs of defending an action of trespass such as the present would not be costs of the board in any way chargeable upon the parishes forming the board, or either of them. It would appear to be only right, if such damages and costs were payable at all, that they should be paid by the parish in which the road is situate, like the expense of repairing the road. And yet the persons who ordered the trespass might be the persons representing the other parishes in the district, and not the parish wherein the road was situate. Just see what a strange state of things this would introduce. Sect. 20 provides that there shall be a district fund, and that the salaries of the officers of each parish, and all expenses incurred by the highway board for the common account and benefit of all the parishes in the district, shall be paid out of the district fund. This could not include these damages and costs, and they could not come out of the district fund. The section goes on to provide that the expense of keeping in repair the highways of each parish, and all other expenses in

1874

MILL v. HAWKER.

relation to such highways, shall be a separate charge on each parish. It would certainly seem strange if the highway board had the power, by a resolution, of throwing upon a particular parish such a charge as that of paying the damages and costs of an action like the present, and unless they could do so, there would be no fund out of which the damages and costs could be paid. When the parish denies the obligation to repair, s. 19 points out the course to be pursued.

It appears to us that it is not the province of the highway board to contest the question whether a particular way is a highway or not, as the members chose to do by the resolution set forth at the beginning of this case. For the above reasons we think that, as the plaintiff was nonsuited, there ought to be a new trial in this case.

KELLY, C.B. The highway board of the district of Camelford, in Cornwall, constituted and incorporated under s. 9 and other sections of 25 & 26 Vict. c. 61, upon the complaint of the churchwardens of the parish of Minster, that a highway in that parish and within the district had been obstructed by a locked gate thrown across it (as was alleged, contrary to the statute), at a corporate meeting, duly convened and held according to the Act, having investigated the matter of the complaint, came to the following resolution, which was then and there entered on the minutes:—"Resolved, that the board having heard the complaint and the defendant, Mr. Mill" (the plaintiff in this action), "and the witnesses, as well as Mr. White, the defendant's attorney, is of opinion that the road leading from Boscastle, by the Wellington Hotel to Crapp's Park, is a public road, and that therefore Mr. Mill, the tenant, and Miss Hellyar, the owner of the land through which it passes, be served with notices to remove the obstruction they have created, and if the same be not removed on or before six o'clock of the 31st instant, the district surveyor remove the same." These notices having been given and disregarded, the surveyor removed the obstruction. The plaintiff relocked the gates, and on the 29th of November another resolution was passed at a board meeting directing the surveyor again to remove the locks. This resolution was notified to Wickett, the district sur-

veyor, and an order of the board, signed by their clerk, forthwith to remove the obstruction, was duly served upon him; and he proceeded, in obedience to the order, to remove the locks from the gates, which was the trespass complained of in this action.

Two questions arise upon this case. The first is, whether this action is maintainable, not against the highway board in their corporate character but, against the individual members of the board who were present at the meeting, and one of whom moved and another seconded the resolution; and I am of opinion that it is not. The making of the resolution was a corporate act done at a corporate meeting convened and held in strict conformity to the Act of Parliament. No one member of the board assumed to exercise or did exercise any personal authority or power. The resolution was the act of the corporation and consisted of the minute made at the meeting according to the Act of Parliament, signed by the chairman, and by the statute receivable in evidence without further proof. I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is ultra vires, and is not, and cannot be in contemplation of law, a corporate act at all.

In *Harman* v. *Tappenden* (1) the Free Fishermen of Faversham, a corporate body, at a corporate meeting made an order of amotion or disfranchisement against the plaintiff, a free fisherman and a member of the corporation, upon which the plaintiff brought his action for damages against the six individual corporators who had made the order, and it was objected "That no action would lie to recover damages against individuals for acts done in their corporate capacity, and that non constat, but that all or some of the defendants might have voted against the order of amotion." When the case came before the Court upon a motion to enter a nonsuit and in arrest of judgment, the Court intimated very strong doubts on this ground how far the defendants were answerable in damages in their private character for

(1) 1 East, 555.

1874

MILL v. HAWKER.

acts done by them in their corporate capacity. And Lord Kenyon, C.J., said that he entertained considerable doubt, notwithstanding what was said in *Rich* v. *Pilkington* (1), and *Rex* v. *Mayor of Rippon* (2), and added, "that he had many years ago moved for a mandamus to the master and fellows of Wadham College to compel them to put the college seal to a return which they were required to make, and to which Mr. Windham, the master, had great objection with respect to the facts agreed upon by a majority to be returned, conceiving that he should thereby make himself individually liable to the consequences, but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character." Lawrence, J., expressed the same doubt, and, finally, upon cause being shewn, the Court held that without proof of malice the action was not maintainable, and the rule was discharged: see also 1 Ventris, 351, and *Rex* v. *Windham* (3), the case alluded to by Lord Kenyon. It is true that where individuals make a pretended corporate act a cloak for a malicious libel or a libel on the administration of justice, the Court will grant a criminal information as in *Rex* v. *Watson*. (4) But an individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character and not against an individual member, who, like Mr. Windham in the *Wadham College Case*, may have been opposed to the act in respect of which the action may be brought. It was, indeed, once imagined, though on very technical grounds, that trespass would not lie against a corporation, and it is so stated in Comyns' Digest, Franchises, F. (19.). But, besides that many authorities are to be found in the year books to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority, or by its direction, trover or trespass is maintainable. In *Yarborough* v. *Bank of England* (5), the plaintiff

(1) Carth. 171.
(2) 1 Ld. Raym. 563.
(3) 1 Cowp. 377.
(4) 2 T. R. 199.
(5) 16 East, 6.

recovered in trover for the unlawful detention by a clerk in the bank, under its authority, of a Bank of England note. Can it be contended that an action could have been maintained against one of the directors of the Bank of England, who might have been present at the resolution that the clerk be directed to detain the note? In *Smith* v. *Birmingham and Staffordshire Gas Light Co.* (1), trover was held maintainable against the company (a corporation) for the wrongful seizure of a quantity of furniture by a bailiff under their authority. And in *Maund* v. *Monmouthshire and Staffordshire Canal Co.* (2), the plaintiff recovered in trespass for the seizing and converting under the orders of the defendants certain barges and a quantity of coal. It was never suggested that in either of these cases the action should have been brought against the individuals who happened to be present when the act in question was ordered to be done. I cannot doubt, therefore, that this action ought to have been brought against the board, and all these decisions are uniform to shew that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law is great and obvious. If judgment be recovered against these defendants execution might issue for the whole amount of damages and costs against any one among them, and he would have no remedy for contribution against the rest, nor as it should seem, upon the facts of the case, for indemnity against the corporation. And it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which come to their hands under the Act of Parliament. On the other hand, if the action had been brought against the board, and judgment obtained against them, they may pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the Act by ss. 20—27, and others.

It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were ultra vires. But I apprehend that this is a misapplication of the term ultra vires. If the board, by resolution or otherwise, had accepted a bill of exchange directing their clerk or

(1) 1 A. & E. 526. (2) 2 Dowl. (N.S.) 113.

1874

MILL v. HAWKER.

other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been ultra vires, and no holder of the acceptance could have recovered the amount against them. It would have been void upon the face of it, and it is immaterial to consider whether the individuals who had written or authorized the acceptance would have been liable to any, and, if any, to what action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized, as a trespass or the conversion of a chattel. If such an act is to be deemed ultra vires, and therefore no action would lie against the corporate body by whom it had been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them, and the decisions above cited would be contrary to law. Two cases have, however, been cited which seem to bear upon the question against the defendants. But the first, *Poulton* v. *London and South Western Ry. Co.* (1) merely shews that there is no implied authority by a railway company to their servants to do an illegal act. Here no question arises upon an implied authority, for this board have expressly authorized and commanded the surveyor to do the act complained of. On the other hand, in the Dulwich College case, *Taylor* v. *Dulwich Hospital* (2), the constitution of the college requiring that leases granted should be at a rack rent, the contract for a lease not at a rack rent was ultra vires and not binding on the corporate body, and so if the plaintiff had been entitled to the relief prayed, it would have been granted against the individuals who had executed an instrument in the form of a corporate act, but which, being ultra vires, was absolutely void.

The remaining question is whether Wickett, the surveyor, is liable to this action. The general rule, no doubt, is that one who does an unlawful act cannot justify himself by pleading the authority or direction of another. But here the surveyor is a public officer charged with the performance of various public duties, and bound by the express words of an Act of Parliament to obey the orders of the highway board, the board themselves being a public body incorporated for public purposes and having public

(1) Law Rep. 2 Q. B. 534. (2) 1 P. Wms. 655.

duties to perform, and who, in ordering their surveyor to remove the obstruction in question, have acted bonâ fide and within the general scope of their duties and authority under the Act of Parliament.

To determine this question we must first consider the provisions of the Act. By s. 17, "The highway board shall maintain in good repair the highways within their district; and it shall be the duty of the district surveyor to submit to the board an estimate of the expenses likely to be incurred during the ensuing year for maintaining and keeping in repair the highways in each parish within the district." And by s. 16, "The district surveyor shall act as the agent of the board in carrying into effect all the duties by this Act required to be carried into effect or to be performed by the board, and he shall in all respects conform to the orders of the board in the execution of his duties, and the assistant surveyor, if any, shall perform such duties as the board may require under the direction of the district surveyor;" and then there are further provisions, already referred to, enabling the board to obtain funds for the performance of their duties and the carrying of the Act into execution.

Now, where all the public highways in any district are well known and ascertained, no difficulty can arise in the execution of the Act. The surveyor inspects them and observes their condition; he makes his estimate of the expense of repairing and keeping them in repair during the ensuing year, and delivers it to the board, who thereupon direct him to effect the repairs from time to time accordingly, and he obeys their directions. But where, as here, he finds a highway which requires or will shortly require to be repaired, but the owner of the land gives him notice that the land is his private property and is no highway at all, what is the course to be pursued? We may suppose that upon his report an order has been given him to repair the highway, and when he proceeds to do so he finds a locked gate thrown across it, and he makes a report to that effect to the board. They, the board, after communicating with the owner of the land and finding that the question is raised and must be determined, highway or no highway, must next consider how this may most conveniently be done.

1874

MILL v. HAWKER.

They may indict the landowner for the obstruction, or they may do as they have done here, they may give him notice to remove the obstruction, and that in default of his doing so they will remove it themselves, and that he may try the question by bringing an action of trespass against them. They accordingly come to a resolution such as they have made here, and they give the order in question to the surveyor, and he in obedience to it removes the locks. If an action be then brought against the board they plead the highway, or defend under the general issue by statute, and the question is settled by the verdict of a jury and no difficulty arises. But if the law be that the landowner may select the surveyor as a defendant, in what condition is he placed? The board have ordered him to effect the necessary repairs, and for that purpose to remove the obstruction. He looks to the statute and he finds that its language is imperative, "He shall in all respects conform to the orders of the board," "and act as the agent" of the board in carrying the Act into effect. He has no means of ascertaining beforehand, or without the verdict of a jury, whether there is a highway or not, nor have the board themselves. He must therefore, at the risk of absolute ruin, obey the order as required by the Act, or he must refuse obedience; in other words, he must disobey the order wherever a highway is in dispute. The board cannot themselves in their own persons remove the obstruction any more than they can repair the highway. They must, therefore, either instruct their surveyor to act on their behalf or resort to some other mode, as by indictment, of raising the question, and if a public highway be established, perform their duty by putting it into repair.

I am not aware of any direct authority in reference to this Act of Parliament. But there are cases which establish a principle within which I think this case may be well decided. In *Buron* v. *Denman* (1) it was held by Parke, B., after consulting the other judges of the Exchequer, that where a naval officer had committed a series of trespasses for which he was personally liable to an action for damages, but the Crown had afterwards ratified his acts, that the ratification was equivalent to a prior command, and the action against him could not be maintained. Baron Parke himself

(1) 2 Ex. 167.

had some doubts whether the ratification had that effect, but the judges, including Baron Parke, were unanimous that the defendant, whose duty it was to obey the commands of the Crown, could not be made personally responsible in an action for the acts done in obedience to such command. In *Andrews* v. *Marris* (1), the clerk of a court of requests, whose duty it was to issue warrants or writs of execution at the orders of the commissioners, having mistaken the effect of an order, issued a precept without an authority, under which the plaintiff was taken in execution, and he was held liable in trespass accordingly. But it was also held that Whetham, the other defendant, one of the serjeants of the Court, and to whom the warrant was directed, and who actually made the arrest, was not liable to the action on the ground "that he was a ministerial officer of the commissioners bound to execute their warrants and having no means whatever of ascertaining whether they are founded upon valid judgments or are otherwise sustainable or not." It was further observed by the Court that there would be something very unreasonable in the law if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant, and that "as the subject matter of this suit was within the general jurisdiction of the Commissioners, and the warrant appeared to have been regularly issued, the defendant Whetham was not liable." It appears to me that in this case the surveyor was in the exact position of Whetham in the case cited. *Dews* v. *Riley* (2) was a similar case. There a void order of commitment had been made by a county court under which the clerk of the court made out a warrant of commitment, and the plaintiff was arrested by a bailiff under that warrant. It was held that the action was not maintainable and the Court observed that "the clerk was a mere ministerial officer to carry into effect the order of the judge, and cannot be liable in trespass for the performance of the duty cast upon him by the express language of the Act of Parliament." And in *Keane* v. *Reynolds* (3), where trespass was brought, for pulling down a cottage which the magistrates had

(1) 1 Q. B. 3.

(2) 11 C. B. 434; 20 L. J. (C.P.) 264.

(3) 2 E. & B. 748.

1874

MILL v. HAWKER.

adjudged to be an encroachment within fifteen feet of the centre of a highway, and convicted the plaintiff of having made the encroachment, against the defendant who, as surveyor of the highways, had pulled down the cottage in the supposed execution of the Act 5 & 6 Wm. 4, c. 50, it appeared that the conviction was void, the way never having been repaired with stones or otherwise. But the Court held that the defendant was not liable to the action "on the principle that the surveyor acted in obedience to the judgment of a court of competent jurisdiction which he was bound to execute." It is true that in most of these cases the defendants who were held irresponsible were bailiffs or other officers acting in obedience or supposed obedience to the orders of a court or some legal tribunal made in the course of the administration of justice. But here, also, as in all these cases, the surveyor is a mere ministerial officer, bound by the express words of an Act of Parliament to obey the orders of the board, and having no means of knowing or ascertaining whether such orders are valid and lawful or otherwise, and the board itself is a public body, having public duties to perform and created and incorporated for public purposes. I know not, therefore, why this officer should not be protected by law as well as the subordinate officers of a court of justice.

It appears to me therefore, upon the whole case, that the defendants have acted throughout strictly within the scope of their authority and their duty. A complaint is made to the board that a highway is unlawfully obstructed. Upon investigating the case they find that an obstruction exists, but that it is disputed whether the spot is a public highway or not. Upon further inquiry they are advised and believe that it is a highway, and therefore that it is their duty to keep it in repair and free from obstructions. There are two modes in which this question, whether a public highway or not, may be raised and determined—by indictment and by action. They think, and I may venture to add I think also, that an action is preferable to an indictment, inasmuch as in a civil action points may be reserved, a motion made for a new trial, and appeals facilitated. They determine to try the question in that form accordingly. They give notice to the parties interested to remove the obstruction, and it is still persisted in,

and the opposite parties are resolved to try the question. They hold a meeting and make the order in question, and it is executed, and we are now called upon to decide whether this action, in which a controversy between the board on behalf of the public and the owner of the land is to be settled, should be brought against individuals who have acted as they believe in the strict performance of their duty in holding and attending a meeting, and resolving in their corporate character that the necessary steps shall be taken, and who may possess no funds or means to meet the expenses of the suit, or to pay damages or costs, or against the board, who are charged with the duties, and intrusted with the powers, and provided with the funds necessary to the management of the highways within the district and to carrying all the purposes of the Act into execution. The question as between the surveyor and the board is of equal importance, and is open in many respects to the same considerations. I think, therefore, and for the reasons I have assigned, that the action should have been brought against the board, and that this action is not maintainable.

Rule absolute.

Attorneys for plaintiff: *Pattison & Wigg, for White & Dingley, Launceston.*

Attorneys for defendants: *Coode, Kingdon & Cotton, for Hawker, Boscastle.*

1874
July 6.

ATTORNEY GENERAL *v.* THE NORTH LONDON RAILWAY COMPANY.

Railway Passenger Duty (5 & 6 *Vict. c.* 79, *s.* 4)—*Cheap Trains Act* (7 & 8 *Vict. c.* 85), *ss.* 6, 8, 9—*Exemption from Duty—Third-class Passengers—Change of Carriages—Stopping at Stations—Power of Board of Trade to dispense with Conditions—Return Tickets—Workmen's Tickets.*

A train is a cheap train within s. 6 of the Cheap Trains Act (7 & 8 Vict. c. 85), and within the exemption from duty contained in s. 9, notwithstanding that the passengers are required at a junction, for the convenience of the traffic, to move from one train to another, provided there is no unreasonable detention so as to reduce the speed at which they travel below the minimum speed of twelve miles an hour, including stoppages, required by the Act.

The exemption from duty in s. 9 applies to fares by such a train not exceeding the parliamentary rate, although the tickets and carriages are not described as third-class tickets and carriages.

A train is not a cheap train within the Act, unless it stops at every ordinary passenger station; and the Board of Trade have no power under s. 8 to dispense with this requirement.

Return tickets issued at fares which, if the tickets were fully used, would not exceed the parliamentary rate, are not within the exemption of s. 9, if the fare for a single journey would exceed that rate.

Semble, that weekly workmen's tickets issued at fares which, if the tickets were fully used, would not exceed the parliamentary rate, would be within the exemption of s. 9, if issued to passengers travelling by a cheap train:

But, *held*, with respect to such tickets issued under a condition limiting the nature and amount of luggage to be carried without extra charge in a manner not in compliance with the conditions of s. 6, and without the dispensation of the Board of Trade under s. 8, that they were not within the exemption.

Affirmed by H. L. 14 Ch. Cas. 48.

INFORMATION under 5 & 6 Vict. c. 79, s. 4, against the North London Railway Company and their general manager, praying for a declaration that the defendants were liable to pay duty at the rate of 5*l.* per cent. on certain passenger fares under that Act, and (par. 3) for an inquiry (if necessary) as to the trains run and the fares charged by the defendants.

The material facts appearing by the information and answer, and the sections of the statutes applicable to the questions at issue, are fully set out in the judgment.

June 5, 6. The case was argued for the Crown by *Sir Henry James, Q.C.* (*Sir R. Baggallay, A.G.*, and *W. W. Karslake*, with

him), and by *Sir J. B. Karslake, Q.C.* (*J. Brown, Q.C.*, and *F. M. White* with him), for the defendants.

1874

ATTORNEY GENERAL v. NORTH LONDON RAILWAY CO.

Cur. adv. vult.

July 6. The judgment of the Court (Kelly, C.B., Pigott, and Amphlett, BB.), was delivered by

AMPHLETT, B. This information is filed for the purpose of recovering from the defendant company certain passenger duties from which they claim to be exempted under the provisions of 7 & 8 Vict. c. 85 (commonly called "The Cheap Trains Act"). By s. 6 of that Act, after reciting that it was expedient to secure to the poorer class of travellers the means of travelling by railway at moderate fares and in carriages in which they might be protected from the weather, it was enacted that all passenger railway companies therein mentioned, and which would include the defendant company, should "by means of one train at the least, to travel along their railway from one end to the other of each trunk, branch, or junction line belonging to or leased by them, so long as they should continue to carry other passengers over such trunk, branch, or junction line, once at the least each day on every week-day, except Christmas Day and Good Friday (such exception not to extend to Scotland), provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several Acts of Parliament, and with the immunities applicable by law to carriers of passengers by railway, and also under the following conditions, that is to say" (amongst others):

"Such train shall start at an hour to be from time to time fixed by the directors, subject to the approval of the Lords of the Committee of the Privy Council for Trades and Plantations.

"Such train shall travel at an average rate of speed not less than twelve miles an hour for the whole distance travelled on the railway, including stoppages.

"Such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line.

"The carriages in which passengers shall be conveyed by such train shall be provided with seats, and shall be protected against

1874

ATTORNEY GENERAL v. NORTH LONDON RAILWAY CO.

the weather in a manner satisfactory to the Lords of the said committee.

"The fare or charge for each third-class passenger by such train shall not exceed one penny for each mile travelled.

"Each passenger by such train shall be allowed to take with him half a hundred-weight of luggage, not being merchandise or other articles carried for hire or profit, without extra charge."

By s. 7 a penalty is imposed on railway companies refusing or wilfully neglecting to comply with the provisions of that Act.

By s. 8 it was enacted that, "except as to the amount of fare or charge for each passenger by such cheap trains, which shall in no case exceed the rate hereinbefore in such case provided, the lords of the said committee shall have a discretionary power, upon the application of any railway company, of dispensing with any of the conditions hereinbefore required in regard to the conveyance of passengers by such cheap trains as aforesaid, in consideration of such other arrangements" as therein mentioned.

And by s. 9 it was enacted, that "no tax shall be levied upon the receipts of any railway company from the conveyance of passengers at fares not exceeding one penny for each mile by any such cheap train as aforesaid."

The defendant company have by various Acts of Parliament become the proprietors of a line of railway which may be called their main line, running northwards from Broad Street, in the city of London, up to a certain place called the Dalston Junction, and from thence dividing into two branches, one running to the east to Poplar, and the other to the west to Chalk Farm.

Before reaching Chalk Farm, a line of railway belonging to other companies diverges from this main line and runs to Richmond and Kew Bridge, and the defendant company have running powers over that line, and work the same, not as a separate line or branch, but in connection with their main line as hereinafter mentioned.

By arrangement the defendant company run some of their trains beyond Poplar to Blackwall, and elsewhere; but for the purposes of this judgment their line at this end may be considered as terminating at Poplar.

1. The defendant company work their system of railways as follows: Trains run continuously to and fro by the Dalston Junction between Broad Street and Poplar; other trains run continuously to and fro, also by Dalston Junction, between Broad Street and Chalk Farm, and between Broad Street and Richmond and Kew Bridge, or one of them. No trains have run for some time past continuously to and fro between Poplar and the stations to the west of Dalston Junction; but passengers desiring to go from Poplar, or any intermediate station between Poplar and Dalston Junction, to any other station to the west, take an up train from Poplar to Broad Street as far as Dalston Junction, and then join, after an interval of a few minutes only, a down train from Broad Street to Chalk Farm or other terminal stations to the west, as the case may be. Under these circumstances, we think that trains running from one end to the other from Broad Street to Poplar, or from Broad Street to Chalk Farm, Richmond, or Kew Bridge, or between other terminal stations on the defendants' system, and complying with the other requirements of the Act, are cheap trains within the meaning of the Act, and that exemption from duty in respect of the fare of passengers by any such train is not lost by their being required, for the convenience of the traffic, to move from one such train to another at Dalston Junction or any other station, provided there is no unreasonable detention at such station, so as to reduce the speed at which such passengers travel below the minimum speed required by the Act.

2. The defendant company only use two classes of carriages upon their lines, which are respectively called and marked first and second-class carriages. The fares charged to second-class passengers from any one terminal station to another terminal station, and indeed between most of the stations, do not exceed the Parliamentary rate of a penny a mile; and in all such cases second-class tickets only are issued. There are, however, a few cases where the fares to and from particular stations for second-class passengers exceed the Parliamentary rate, and in some of these cases, but not all, third-class tickets are issued at fares not exceeding the Parliamentary rate, and where third-class tickets

1874

ATTORNEY GENERAL v. NORTH LONDON RAILWAY CO.

are so issued, there being no third class carriages, the holders of second and third-class tickets are admitted to the same carriages, and are afforded the same accommodation in every respect.

The defendants claim exemption from duty in every case in which the fare charged to the holders of either second or third-class tickets do not exceed the Parliamentary rate of one penny a mile.

The claim to exemption is disputed by the Crown on various grounds; and, first, it was contended that, in the absence of any third-class carriages, a train ought not to be considered a cheap train within the meaning of the Act; and reliance was placed upon the preamble of the 6th section of the Act, and the express mention of third-class passengers in the body of the section, which, it was forcibly argued, shewed that the class of persons whose fares were to be exempted from duty were those who would ordinarily travel in third-class carriages, and not those who, if there were both second and third-class carriages, would prefer the former, even at a greater charge, in order to secure themselves from the discomfort of travelling in company with third-class passengers.

We are, however, of opinion that the objection ought not to prevail. There is no definition of a "third-class passenger" in the Act, and it would, we think, be unreasonable to hold that the question whether a person is a third-class passenger should depend upon the number affixed to his carriage or ticket, which might be changed at any moment. We apprehend that third-class passengers were mentioned in the 6th section of the Act, merely to shew that it was for that class of passengers only that the fares were to be compulsorily limited; leaving the companies to exercise their own discretion as to the fares to be charged to other passengers. It might otherwise have been held—as indeed is contended in the information, though not insisted upon in the argument before us—that no passenger by a cheap train of whatever class should be charged more than the Parliamentary rate. Suppose the company chose to run a Parliamentary train with only one class of carriages, such as are usually called third-class carriages, would it not be a cheap train within the meaning of the

Act? and would it be deprived of that character because the company gave the passengers the benefit of better or more commodious carriages?

It was then contended on the part of the Crown, that even assuming that the train was not deprived of its character of a cheap train within the Act by the absence of third-class carriages, still that the fares of those only who asked for third-class tickets would be within the exemption, and that, if it be difficult or impossible to distinguish them from the others, the company have brought it upon themselves and cannot complain. Looking, however, at the language of the 9th section of the Act, where passengers generally, and not third-class passengers, are mentioned, we are of opinion that such distinction cannot be maintained, and that the fares of all passengers by a cheap train of whatever class are within the exemption, if not exceeding the Parliamentary rate.

It is easy to see that this construction may enable companies to claim exemption for the fares of passengers not within the purview of the Act; but that must be remedied, if thought advisable, by the legislature, and not by putting a strained meaning on the language of the Act as it stands.

3. It was next contended on the part of the Crown, that no train which did not stop at every ordinary passenger station between the terminal stations, and which did not carry passengers to all the stations at which they did stop at the Parliamentary rate, was a cheap train within the meaning of the Act, and that consequently the fares of no passenger travelling by it of whatever class would be within the exemption. And we are of that opinion.

It was but faintly contended on the part of the defendants that this would not be so on the construction of the Act alone; but it was said that the Board of Trade had dispensed with both these conditions. It is, however, our opinion that, even assuming that the Board of Trade, after the requisite knowledge of the fact, did de facto intend to dispense therewith (which, but for the admission on the part of the Crown, might have been very much doubted upon the evidence in the case), it was beyond their power to do so.

1874

ATTORNEY GENERAL v. NORTH LONDON RAILWAY CO.

1 App Cas 167

By the 8th section of the Act the rates of fares are expressly excepted out of the dispensing power, and with respect to the stopping of trains we think that the dispensing power is confined to the condition (expressly so called) at the end of the clause, and does not extend to the requirements in the previous part of the clause, which appear to constitute the essential definition of a cheap train under the Act. If this be so, it seems to us that to make the clause consistent with itself, the passenger stations mentioned in the third condition, at which trains are to stop if required, must be taken to mean stations other than the ordinary passenger stations before mentioned, such, for instance, as those which are sometimes established for the convenience of private individuals, or particular works, or on particular days for the accommodation of market people.

The only other questions raised before us which are ripe for decision without further inquiry into the facts, are as to return tickets, and as to workmen's tickets.

4. With regard to return tickets, it appears that in some instances such tickets are issued to second-class passengers at fares which, assuming them to make full use of their tickets, would not exceed the Parliamentary rate, while the fare for a single journey over the same distance would exceed that rate; and we are of opinion that no exemption can be claimed in respect of such return tickets, since it appears to us to be the intention of the Act that a passenger whose fare is to be exempt should have the option of travelling for any part of his journey at the Parliamentary rate.

5. With regard to workmen's tickets (1), which are weekly

(1) By s. 45 of "The North London Railway (City Branch) Act, 1861" (which Act authorized the construction of the line from Broad Street to Kingsland) the company were required to run a train every morning in the week from Kingsland to Broad Street, and one train every evening from Broad Street to Kingsland, at such hours (not later than 7 a.m. nor earlier than 6 p.m.) as might be most convenient for the labouring classes residing at or beyond Kingsland and having business in London, at fares not exceeding 1*d.* per passenger for each journey; and by "The North London Railway Act, 1867," s. 51, it was enacted that the company should not be required to issue a ticket to any artisan, mechanic, or daily labourer under the provisions of the Act of 1861 for a less period than one week; the applicant for a ticket was to give his name and address, and the name and address of

tickets accorded to artisans, mechanics, and daily labourers upon a special contract, it appears that the charge for every such ticket is 1*s.* only, which, if the holder availed himself of it every day in the week, would not exceed the Parliamentary rate; but such tickets are only issued for trains running from Dalston Junction to Broad Street, and not for any train which travels from one end to the other of any "trunk, branch, or junction line" of the defendants; and, moreover, the passengers availing themselves of these tickets are not allowed to take with them half a hundredweight of luggage without extra charge, in compliance with the Cheap Trains Act, and we do not find any evidence or admission that the last condition has been dispensed with by the Board of Trade.

We think, therefore, that under the present arrangements the fares of these workmen's tickets are not entitled to the exemption, although we should have been of a different opinion if such tickets were issued to passengers travelling by a cheap train as herein defined, and if the condition as to luggage were dispensed with, as it doubtless would be on application, by the Board of Trade.

Under these circumstances, the proper decree appears to us to be as follows:—

DECLARE. That every train running from one end to the other of the line, between Broad Street Station and Poplar Station, or between Broad Street Station and Chalk Farm, Richmond, or Kew Bridge, or between other terminal stations on the defendants' system of railways, and conveying passengers to and from such terminal and every intermediate ordinary passenger station at fares not exceeding the Parliamentary rate, and complying with the several other conditions mentioned in the 6th section of the Cheap Trains Act, so far as they have not been

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his employer, and before issuing the ticket the company were to have a reasonable time to inquire whether he was an artisan, mechanic, or daily labourer within the meaning of the Act. And by s. 50 the compensation for injury to a passenger by such train was limited to 100*l.*, the amount to be fixed by arbitration.

The tickets in question were issued under these provisions; but one of the conditions, subject to which they were issued, was as follows: "Each holder of a workman's ticket will be allowed to carry at his or her sole and exclusive risk any trade tools not exceeding 28lbs. weight, so packed as not to be inconvenient or dangerous. No other luggage of any description will be conveyed free of charge with the holders of workmen's tickets."

1874

ATTORNEY GENERAL v. NORTH LONDON RAILWAY CO.

properly dispensed with by the Board of Trade, ought to be considered a cheap train within the meaning of the Cheap Trains Act, notwithstanding there may be no third-class carriages in such train.

That the fares of passengers by such cheap trains are entitled to exemption from duty if they do not exceed the Parliamentary rate, whether the tickets issued to them are second or third class.

That such exemption is not lost by passengers being required, for the convenience of traffic, to move, at any particular station, from one such cheap train to another, provided there is no unreasonable detention at such station, so as to reduce the speed at which such passengers travel below the minimum speed required by the Act.

That no train ought to be considered a cheap train within the meaning of the Act, whether approved by the Board of Trade as a cheap train or not, which does not stop at every intermediate ordinary passenger station, and which does not convey some class of passengers to and from every station, at fares not exceeding the Parliamentary rate, and that no exemption ought to be allowed in respect of the fares of passengers by any such train, notwithstanding such fares may not exceed the Parliamentary rate.

That the fares received for return tickets are not exempt from duty, unless the fares that would be charged to the same class of passengers for the single journey over the same distance would not exceed the Parliamentary rate.

That the fares received for workmen's tickets under the existing arrangements are not exempt from duty.

DIRECT, in case the parties differ, an inquiry as prayed in the 3rd paragraph of prayer, regard being had to the above declarations.

Attorney for the Crown: *Solicitor of Inland Revenue.*
Attorneys for defendants: *Paine & Layton.*

June 26.

[IN THE EXCHEQUER CHAMBER.]

THE LIVER ALKALI COMPANY *v.* JOHNSON.

Common Carrier—Fixed Termini—Definite Route—Conveyance of a Single Customer's Goods—Barge-owner.

The defendant was a barge-owner, and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure. In an action against the defendant by the plaintiffs for not safely and securely carrying certain goods:—

Held, affirming the judgment of the Court below, that the defendant in

exercising this employment had incurred the liability of a common carrier, and was liable though the goods were lost without negligence on his part.

By Brett, J. The defendant was not a common carrier nor liable as such, but was liable as a ship-owner carrying goods for hire, upon the custom applicable to him as such.

APPEAL by the defendant from a decision of the Court of Exchequer discharging a rule to enter a verdict for the defendant. (1)

June 20. *C. Russell, Q.C.* (*Butt, Q.C.*, with him), argued for the defendant; and *T. H. James* (*Aspinall, Q.C.*, with him), for the plaintiffs.

The following authorities, in addition to those cited in the court below (2), were referred to:—

Abbott on Shipping, 11th ed. p. 277; Angell on Carriers, 4th ed. p. 59; Jones on Bailments, 4th ed. p. 106; *Elsee* v. *Gatward* (3); *Rich* v. *Kneeland* (4); Kent's Commentaries, lect. 40, part 4; *Laveroni* v. *Drury*. (5)

Cur. adv. vult.

June 26. The following judgments were delivered:—

BLACKBURN, J. It appears by the case stated for this Court on appeal that the defendant was engaged in carrying from Widness to Liverpool some salt cake of the plaintiffs in a flat on the river Mersey. The goods were injured by reason of the flat getting on a shoal in consequence of a fog. This was a peril of navigation, but could in no sense be called the act of God or of the Queen's enemies.

The jury found that there was no negligence on the part of the defendant.

The question, therefore, raised is, whether the defendant was under the liability of a bailee for hire, viz., to take proper care of the goods, in which case he is not responsible for this loss, or whether he has the more extended liability of a common carrier, viz., to carry the goods safe against all events but acts of God and the enemies of the Queen.

(1) Law Rep. 7 Ex. 267.
(2) Law Rep. 7 Ex. at pp. 268, 269.
(3) 5 T. R. 143.
(4) Cro. Jac. 330.
(5) 8 Ex. 166; 22 L. J. (Ex.) 2.

1874

LIVER ALKALI CO. v. JOHNSON.

We have purposely confined our expressions to the question, "whether the defendant has the liability of a common carrier," for we do not think it necessary to inquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him.

The rule imposing this extended liability on common carriers was originally established, as Lord Mansfield states, in *Forward* v. *Pittard* (1), on the ground of public policy: "To prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man." And Lord Holt explains it, in the celebrated judgment in *Coggs* v. *Bernard* (2), as existing in the case of one that exercises a public employment: "And this is the case of the common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged 26 Car. 2, in the case of *Morse* v. *Slue*. (3) And this is a politic establishment contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing." It is too late now to speculate on the propriety of this rule, we must treat it as firmly established that, in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability. It appears from the evidence stated that the defendant was the owner of several flats, and that he made it his business to send out his flats under the care of his own servants, different persons as required from time to time, to carry cargoes to or from places in the Mersey, but that it always was to carry goods for one person at a time, and that "he carried for any one who chose to employ him, but that an express agreement was always made as to each voyage or employment of the defendant's flats," which means, as we understand the evidence, that the flats did not go about plying for hire, but were waiting for hire by any one. We think that this describes the ordinary employment of a lighter-

(1) 1 T. R. 27, at p. 33. (2) 2 Ld. Raym. at p. 918.
(3) 1 Vent. 190, 238.

man, and that, both on authority and principle, a person who exercises this business and employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries.

It was argued before us that the defendant could not have this liability unless he held himself out as plying between two particular places, or had put up his flat, like a general ship, to go to some particular place, and take all goods brought him for that voyage.

It was urged that in *Morse* v. *Slue* (1) the goods were probably put on board a ship put up as a general ship. It certainly may have been so, but the count is set out in Ventris and is general, that by the law and custom of England charterers and governors of ships which go from London beyond sea are bound, &c., and the ultimate decision was that this count was proved. Hale, C.J., seems to have had a difficulty from the fact that the ship was bound to foreign parts, and that the shipowner would not by the civil law or the maritime law be chargeable for piracy or damnum fatale (a difficulty, it may be remarked, which does not apply to the present case, where the whole transaction is in England), but nothing is in any report said as to the ship being a general ship. And on that count no judgment could have been given on that ground.

The ultimate decision on the special verdict has always been understood to apply equally to all ships employed in commerce and sailing from England, as is shewn from the forms of charter-party and bill of lading in ordinary use in England, which always contain an engagement to deliver the goods in the same condition they were received aboard, and, when Lord Tenterden first wrote, contained only an exception of the dangers of the seas; now the exceptions in each class of instrument are much more extensive. And certainly it is difficult to see any reason why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries the lading in different parcels for different people.

To come nearer to the particular case, we find that "lightermen"

(1) 1 Vent. 190, 238.

1874

LIVER ALKALI CO. v. JOHNSON.

are specially named in Bacon's Abridgment "Carrier" (A.), and in the notes to *Coggs* v. *Bernard.* (1) In *Lyon* v. *Mells* (2) the course of business of the defendant is thus described: "The defendant kept sloops for carrying other persons' goods for hire, and also lighters for the purpose of carrying these goods to and from his sloops, and when he had not employment for his lighters in his own business, he let them for hire to such persons as wanted to carry goods to other sloops." If there be any difference between the employment of the now defendant, as described in this case, and the employment of the defendant in *Lyon* v. *Mells* (2), it would seem that the latter was less clearly a public employment. The great point discussed was, whether a notice limiting the liability of the defendant was, as Lord Ellenborough states it, illegal, as being "to exempt him from a responsibility cast on him by law as a carrier of goods by water for hire," a proposition which could not well have been discussed by any one who did not think that the defendant had, but for the notice, incurred that responsibility. The point actually decided was, that the terms of the notice did not relieve the defendant from liability for furnishing an unseaworthy lighter. As to this Lord Ellenborough says: "Every agreement must be construed with reference to the subject matter, and looking at the parties to this agreement (for so I denominate the notice), and the situation in which they stood in point of law to each other, it is clear beyond a doubt that the only object of the owners of lighters was to limit their responsibility in those cases only where the law would otherwise have made them answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against." We think that Mr. James, in arguing for the plaintiff in this case, was right when he relied on *Lyon* v. *Mells* (2) as an important authority in favour of his client.

It is true that the point was not precisely decided in *Lyon* v. *Mells* (2), and if it had been, it would not have been binding upon us in a Court of Error; but the opinion of Lord Ellenborough, and (as far as we can judge from the report) of every one concerned in the case, was that it was too clear for argument that, but for

(1) 1 Sm. L. C. 6th ed. 177. (2) 5 East, 428.

the notice, the lighterman, acting as the defendant did in that case, would have been liable to the same extent as a common carrier. Lord Abinger, in *Brind* v. *Dale* (1), expressed a strong opinion that a town carrier could not be considered a common carrier; but he reserved the point, and as the jury found in favour of the defendant on the question whether the goods were received by him as a common carrier, it never was reviewed in banc.

The ruling of Alderson, B., in *Ingate* v. *Christie* (2), is in express conformity with what appears to have been Lord Ellenborough's view in *Lyon* v. *Mells* (3), and no English authority has been cited in conflict with this doctrine.

We think, therefore, that the judgment below was right, and should be affirmed.

MELLOR, ARCHIBALD, and GROVE, JJ., concurred.

BRETT, J. I cannot come to the conclusion that the defendant in this case was liable whether he was a common carrier or not, because I conclude that he was liable, notwithstanding that I am clearly of opinion that he was not a common carrier. It seems to me that it is of the very essence of the definition of a common carrier, that he should be one who undertakes to carry the goods (not being dangerous, or of unreasonable weight or bulk) which are first offered to him—he who does not so undertake is not a common carrier. The force of the word "common" is not that the carrier's business is a public one, or "in common with others," but that he undertakes to carry for all indifferently in the sense of for the first comer, i.e., "for all in common." It is clear to my mind that a shipowner who publicly professes to own sloops, and to charter them to any one who will agree with him on terms of charter, is not a common carrier, because he does not undertake to carry goods for or to charter his sloop to the first comer. He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common carrier. The defendant in the present case, in my

(1) 2 Mood. & Rob. 80, at p. 83; S. C. 8 C. & P. 207.

(2) 3 C. & K. 61.

(3) 5 East, 428.

1874

LIVER ALKALI CO. v. JOHNSON.

opinion, carried on his business like any other owner of sloops or vessels, and was not a common carrier, and was in no way liable as such. But I think that, by a recognised custom of England,—a custom adopted and recognised by the Courts in precisely the same manner as the custom of England with regard to common carriers has been adopted and recognised by them—every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions.

I think that this liability attaches to shipowners carrying goods, by reason of recognised custom, which may be pleaded as the custom of England, just as the custom of England as to common carriers may be pleaded. But it is a custom wholly independent of the similar custom with regard to common carriers. The similarity of the two customs has occasioned phraseology to be used in some cases which has raised an inaccurate idea that shipowners are common carriers; but I am of opinion that they are not. They are not bound to carry for the first comer. I therefore hold that the defendant is liable as a shipowner, upon the custom applicable to him as such, but is not liable as a common carrier, upon the custom applicable to that business or employment.

Judgment affirmed.

Attorneys for plaintiff: *Wright & Venn, for J. & R. Quinn, Liverpool.*

Attorneys for defendant: *Field & Roscoe, for Bateson & Co., Liverpool.*

COPIN *v.* ADAMSON.
COPIN *v.* STRACHAN.

1874
*May 8.**

Foreign Judgment—Liability of English Shareholder in a Foreign Company—Effect of taking Shares—Agreement to submit to Jurisdiction—Service of Notice at elected Domicile.

To an action on a French judgment, the defendant pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the Court, or subject to French law; that he was never served with any process; nor had any notice or opportunity of defending himself.

Replications. (1.) That the defendant was holder of shares in a French company, having its legal domicile at Paris, and became thereby subject, by the law of France, to all the liabilities, &c., belonging to holders of shares, and, in particular, to the conditions contained in the statutes or articles of association; that by these statutes it was provided and agreed that all disputes arising during liquidation between shareholders should be submitted to the jurisdiction of the French court; that every shareholder provoking a contest must elect a domicile, and, in default, election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated; and that all summonses, &c., should be validly served at the domicile formally or impliedly chosen; that the company became bankrupt, and defendant's unpaid calls became payable to the plaintiff, as assignee; that he made default and provoked a contest; that he never elected a domicile, and thereupon the plaintiff caused summonses, &c., to be served at the office aforesaid; that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular; and that the defendant was bound to appear, but did not, whereupon judgment by default was recovered against him. (2.) A similar replication, alleging that defendant was a shareholder as in the 1st replication mentioned, and stating provisions of the law of France to the same effect as those contained in the above-mentioned statutory articles of association, but omitting all reference to the statutes or articles of association, and alleging that defendant did not elect a domicile, and also that the company became bankrupt, &c., and that a summons was served as in the 1st replication stated. On demurrer:—

Held, that the 1st replication was good, and (by Amphlett and Pigott, BB., Kelly, C.B., dissenting) that the 2nd replication was bad.

In these two actions the pleadings, which, so far as they are material to this report, were identical, are as follows:—

Declaration by the assignee in bankruptcy of the Société de Commerce de France, Limited, on a judgment for 151*l.* 15*s.* recovered on the 7th of February, 1867, in the empire of France, by him against the defendant in the Court of the Tribunal of

* Decided in Easter Term.

1874

COPIN v. ADAMSON. COPIN v. STRACHAN.

Commerce of the Department of the Seine, being a court duly holden, and having jurisdiction in that behalf.

Plea. 3. That the suit was commenced, according to the French law, by process and summons, and that the defendant was not at any time previous to the recovery of judgment resident or domiciled within the jurisdiction of the said Court, nor is he a native of France, and he was not served with any process or summons, nor did he appear, nor had he any notice or knowledge of any process or summons, or any opportunity of defending himself.

Replications. 1. That before the suit in which judgment was recovered the defendant became, and was the holder of divers shares in a company lawfully existing in France, and being the company in the declaration mentioned, having its seat or place of business and legal domicile at Paris, in the Department of the Seine, and within the jurisdiction of the Court of the Tribunal of Commerce of that department; and the defendant then became, and thereby was, by the law of France, subject to all the liabilities, rights, and privileges belonging to the holders of shares in the company, *and in particular to the regulations, conditions, and stipulations contained in the statutes or articles of association, and by those statutes, or articles*, it was provided and agreed that all disputes which might arise during the liquidation of the company between (amongst others) the shareholders and the company with respect to the affairs of the company, should be submitted to the jurisdiction of the competent tribunal of the department of the Seine, and that every shareholder who should provoke a contest must elect a domicile at Paris, and that, in default of election, election should be made of full right at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses, or notice of process, should be validly and effectually served at the domicile formally or impliedly chosen; that whilst the defendant was a shareholder the company was declared bankrupt, according to the law of France, and the plaintiff was appointed assignee, and the whole amount unpaid on the defendant's shares became payable to the plaintiff, and the defendant made default in payment and provoked a contest within the meaning of the statutes or articles; that the defendant never formally elected a domicile at Paris, or

elsewhere in France, and thereupon the plaintiff, to recover the amount due to him, did, according to the law of France and practice of the Court of the Tribunal of Commerce, cause a summons, directed to the defendant, to issue, calling on him to appear and answer the plaintiff in an action for the amount unpaid on his shares; that the plaintiff caused the summons to be delivered for the defendant at the office of the imperial procurator of the civil tribunal of the department where the company's office was situated; that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular, and by the law of France and practice of the Court amounted to notice to the defendant then having his real domicile out of France; that he was bound to appear, but did not, whereupon judgment by default was recovered against him.

2. That before the suit, &c., the defendant became and was the holder of divers shares in a company lawfully existing in France, and being the company in the declaration mentioned, and thereby became, and was, by the law of France, subject to all the liabilities, &c., belonging to the holders of shares of the company according to the law of France; that the company had its seat or place of business at Paris, in the department of the Seine, and within the jurisdiction of the Court of the Tribunal of Commerce of that department, and the defendant was resident and domiciled in England, and by reason and in consequence thereof, it became and was the right and duty of the defendant, according to the law of France, upon his becoming the holder of such shares to elect a domicile within France, to wit, at Paris, at which notices should be served upon him, and to notify to the directors or administrators of the company such elected domicile; that it was and is the law of France, that if a shareholder in such a company, who is resident and domiciled abroad, shall neglect to elect and notify a domicile within France, it should be lawful for the directors, &c., to serve such shareholder with notice of process at the domicile of the public procurator of the tribunal of the place where the company have their seat or place of business and legal domicile, and that such domicile should be taken to be the domicile of election of such shareholder for the purpose of such

1874

COPIN v. ADAMSON. COPIN v. STRACHAN.

service, and such service should be as valid and binding as though made on him personally, and that such shareholder so served with notice should be subject to the jurisdiction of such tribunal in respect to the demand of the directors, &c., against him; that the defendant did not elect or notify a domicile in France; that whilst he was a shareholder the company was declared bankrupt according to the law of France, and the plaintiff was appointed assignee, and the whole amount unpaid on the defendant's shares thereupon became due and payable to the plaintiff; and thereupon the plaintiff, according to the law of France and practice of the Court of the Tribunal of Commerce of the Department of the Seine, being the Court within the jurisdiction of which the seat or place of business and domicile of the company were, caused a summons, &c.—[Then followed averments as to the service and regularity of the notice, &c., similar to those in the previous replication.]

Demurrer to 1st and 2nd replications and joinder.

The cases were argued on the 29th of April and the 4th of May, 1874, by *Benjamin, Q.C.* (*Holl* and *Sydney Hastings* with him), and by *Holl*, for the plaintiffs respectively in the two actions; by *Matthews, Q.C.* (*R. E. Webster* with him), for the defendant Adamson, and by *French* (*C. Russell, Q.C.*, with him), for the defendant Strachan. The following authorities were cited: *New Brunswick and Canada Ry. Co.* v. *Conybeare* (1); *Bank of Australasia* v. *Harding* (2); *Bank of Australasia* v. *Nias* (3); *Meeus* v. *Thellusson* (4); *Vallée* v. *Dumergue* (5); *Fergusson* v. *Fyffe* (6); *General Steam Navigation Co.* v. *Guillou* (7); *Schibsby* v. *Westenholz* (8); *Godard* v. *Gray.* (9)

Cur. adv. vult.

May 8. KELLY, C.B. [after stating the pleadings, proceeded as follows:—] The difference between these two replications is this, that in the first it is alleged that the defendant being a shareholder in the company was as such bound by the articles of asso-

(1) 9 H. L. C. 711.
(2) 9 C. B. 661; 19 L. J. (C.P.) 345.
(3) 16 Q. B. 717; 20 L. J. (Q.B.) 284.
(4) 8 Ex. 638; 22 L. J. (Ex.) 239.
(5) 4 Ex. 290; 18 L. J. (Ex.) 398.
(6) 8 Cl. & F. 121.
(7) 11 M. & W. 877.
(8) Law Rep. 6 Q. B. 155.
(9) Law Rep. 6 Q. B. 139.

ciation, and by reason of those articles of association was liable to be sued in the French court, whilst in the second it is merely alleged that by the law of France he as a shareholder in the company became liable to be sued in the French court under the circumstances stated. Now the questions raised by these two replications are entirely questions of law; and before proceeding to deal with the authorities I will very shortly state what I conceive to be the law bearing upon them. I apprehend that it is now established by the law of this country that one who becomes a shareholder in a foreign company, and therefore and thereby a member of that company—such company existing in a foreign country, and subject in all things to the law of that country—himself becomes subject to the law of that country, and to the articles or constitutions of that company construed and interpreted according to the law of that country in all things and as to all matters and all questions existing or arising in relation to or connected with the acts and affairs and the rights and liabilities of such company and its members severally and collectively; and if that company, by the law of the country in which it exists, or by the articles of its constitution, is subject to the jurisdiction of a particular court within that country, so also is each shareholder or member subject to its jurisdiction in all cases in relation to or connected with such company.

It was contended, on the part of the defendant, on the authority of *Schibsby* v. *Westenholz* (1), that he not being a native or subject of France, and so subject to French law, and not being either resident or domiciled in France, and not having received notice or had knowledge de facto of the suit which resulted in the judgment relied on in the replications, is not bound by that judgment. Now in that case the decision was that "the judgment of a foreign court, obtained in default of appearance against a defendant, cannot be enforced in an English court, where the defendant, at the time the suit commenced, was not a subject of or resident in the country in which judgment was obtained; for there existed nothing imposing on the defendant any duty to obey the judgment;" and the law is well and, in my judgment, rightly stated thus in the judgment of Blackburn, J. (at

(1) Law Rep. 6 Q. B. 155.

1874

COPIN v. ADAMSON. COPIN v. STRACHAN.

p. 161):—"Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, then we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country so as to have the benefit of its laws protecting them, or as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think that the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of these suppositions is negatived in the present case." It is to be observed that in that case no fact was found imposing on the defendant the duty of obeying the judgment. The case was not one of a person alleged to be bound by the law of a foreign country and the judgment of a foreign tribunal by reason of his having become a shareholder in a company existing only under the law of that country, but it was one of a contract between the plaintiff, who was resident in England, and defendant, who was resident in France, for the sale and delivery of merchandise. There was nothing to prevent the French seller suing the English buyer here for breach of contract, and nothing which rendered the latter amenable to a French tribunal. In the present case we have to consider the law as applicable, not to an ordinary mercantile contract, but to persons who, though not resident in the foreign country, have become members of what we should call a joint stock company, existing only in that country, and subject to its laws. I have stated already what I consider to be the law governing such cases, and I now proceed to advert to some of the other authorities which were cited on the argument.

The first case to which it is necessary to refer is the *Bank of Australasia* v. *Harding* (1), of which the marginal note is as follows:—"The members resident in England of a company formed for the purpose of carrying on business in a place out of England are bound in respect of the transactions of that company by the

(1) 9 C. B. 661; 19 L. J. (C.P.) 345.

law of the country in which the business is carried on." This proposition of law is really decisive of the present case, and it is fully borne out by the facts, which deserve to be examined somewhat in detail. The defendant Harding, it appeared, was sued on a judgment against him obtained in Australia, where a company was established, of which he had become a member. He was not resident in the colony nor subject to its laws, unless by becoming a shareholder he became so. The company was itself established by a colonial statute, which "may be assumed," says Wilde, C. J. (at p. 685), "to have been obtained at the request of the parties. It provided that one member holding a principal office in the company might sue or be sued instead of the whole body, and that execution might issue against the property of the other members. But while giving this benefit to the company, the Act provides that the rights and liabilities of the parties should not be varied. Now, independently of the colonial Act, the defendant would have been liable in respect of the demand for which the defendant is now sued; and if the judgment had been recovered in an action brought against all the members jointly an action of debt or assumpsit would clearly have lain against the defendant upon that judgment." Granting, therefore, that in an action against all the members the defendant would have been responsible, the question arose whether he was responsible in an action on a judgment obtained in the colony against the chairman or principal officer, who under the colonial Act was liable instead of all the members. The defendant set up the same defence as is relied on here—that he was not resident in the colony, and had no notice or knowledge of the proceedings. But the answer was that by becoming a member of the company which existed only in the colony, and by virtue of its laws, he had, in all matters relating to the company, himself become bound by the colonial law, and subject to the jurisdiction of the colonial courts. "I am of opinion," says Cresswell, J. (at p. 687), "that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a company who must be taken to have been a consenting party to the passing of the colonial Act. He must, therefore, be regarded as having agreed that suits upon contracts entered into by the company might be brought against the chairman, and

1874

COPIN v. ADAMSON. COPIN v. STRACHAN.

that the chairman should for all purposes represent him in such actions. Being his own appointed agent he had notice of the proceedings. If he had been resident in the colony he could not have made himself party to the action or in any way personally interfered in the proceedings." Now how had the chairman been appointed his agent? Simply by virtue of the defendant having become a member of the company; and therefore, service of process on the chairman, who by the law of the colony was liable to be sued, was held a service upon the defendant, although he was not resident or domiciled in the colony, and had never himself heard of the proceedings. The answer to the defendant's plea that he was non-resident and had no notice "is," says Talfourd, J., in his judgment (at p. 688), "that the defendant was a member of a partnership carrying on business in the colonies, and was contented to leave his property there to be regulated by the law of the colony." It certainly seems to me impossible to have an authority more directly in point, and the *Bank of Australasia* v. *Nias* (1) is to the same effect.

But there is one more case to which I ought to refer: that of *Vallée* v. *Dumergue.* (2) There to an action on a French judgment the defendant pleaded that he was not, during the accruing of the cause of action, &c., resident in France, or within the jurisdiction of the Court, nor subject to the law of France; that he was never served with any process or notice, or had any notice of the proceedings; nor did he appear in court or have any opportunity of defending himself, and the proceedings were taken in his absence and without his knowledge. The plaintiff replied that, the defendant became a shareholder in a certain company in France, and subject to all the liabilities and rights thereto attaching; that the defendant was resident in England, and by reason thereof it became necessary, by the law of France, for the defendant to elect a domicile in France at which the directors might notify to him all proceedings relative to the company or the defendant as such shareholder; that by the law of France all legal proceedings affecting any party having his real domicile out of that kingdom left for him at such elected domicile were as valid as if left at his real domicile in France; that the defendant made election of a

(1) 16 Q. B. 717; 20 L. J. (Q.B.) 284. (2) 4 Ex. 290; 18 L. J. (Ex.) 398.

domicile at Paris, and gave notice thereof to the plaintiffs; that the assets of the company being insufficient to discharge their debts, the defendant, as a shareholder, was, by the law of France, liable to be sued and to pay a certain sum; that the plaintiffs, for the recovery thereof, caused a summons to be left at his elected domicile, requiring him to appear in court on a certain day; that he did not appear, whereupon the plaintiffs recovered judgment by default. This replication was held good on demurrer, and so far, at all events, as regards the second replication demurred to, which alleges that the defendant was bound by the "law of France" to elect a domicile, it is conclusive. The only difference is that there the defendant did elect, whilst here he failed to elect and the election was made for him. But in that case, as in this, service was effected at the elected domicile, and in this case, as in that, I think such service was a good service upon the defendant, although he was not there, and never heard of the proceedings against him.

Upon all these authorities, therefore, it appears to me that the defendant is liable, and the principles they establish are, in my opinion, reasonable and just. The defendant, as a shareholder in this foreign company, becomes entitled to all the benefits resulting from the possession of the shares; surely it is very reasonable that the law of France, and, as is alleged in the first replication here, the articles of association also, should provide that he should elect a domicile, and that if he does not, one may be elected for him, at which process, if necessary, may be served. Otherwise it might be that a shareholder might for years receive all the benefits belonging to his position and yet escape all the burthens, just because his real domicile was out of the kingdom of France, or there were no means of discovering where he might be and enforcing a demand upon him. My judgment, therefore, is for the plaintiff upon both the replications demurred to.

AMPHLETT, B. An important question is raised on these replications, involving the liability of a British subject to be sued in the courts of a foreign country. As to the first replication demurred to, the Court is unanimously of opinion that the defendant is shewn upon the face of it to have contracted with the company, of which he is a shareholder, and whose representative the plaintiff is, that

1874

COPIN v. ADAMSON. COPIN v. STRACHAN.

he would, under the circumstances disclosed, be amenable to the jurisdiction of the Court of the Tribunal of Commerce of the Department of the Seine. But as to the second replication, my brother Pigott and myself think that although the allegations are sufficient to shew that the defendant's contract is to be governed by French law, still that they do not shew that he is subject to the jurisdiction of the French Court. The contract must be interpreted by an English tribunal.

Now the plaintiff seems to have thought that all he need allege is that French law is to govern the contract. But it by no means follows that the defendant has subjected himself to a foreign jurisdiction. The cases which have been referred to shew that before an Englishman can be made amenable to a foreign Court he must bear either an absolute or a qualified or temporary allegiance to the country in which the Court is. He must, as is pointed out by Blackburn, J., in *Schibsby* v. *Westenholz* (1), be a subject of the country, or as a resident there when the action was commenced (or perhaps it would be enough if he were there when the obligation was contracted, though upon this point doubt is expressed), so as to be under the protection of or amenable to its laws. The learned judge also puts two other cases in which a person might be bound, one where he, as plaintiff, has selected his tribunal, and the other where he has voluntarily appeared before it and takes the chance of a judgment in his favour. The defendant's liability in the latter case, however, is left an open question. But independently of that question, I apprehend that a man may contract with others that his rights shall be determined not only by foreign law, but by a foreign tribunal, and thus by reason of his contract, and not of any allegiance absolute or qualified, would become bound by that tribunal's decision. It is upon this ground that I decide the demurrer to the first replication in the plaintiff's favour. I think that the defendant must be taken to have agreed that if he did not elect a domicile one should be elected for him; for the articles of association provide for its being done. It is said that it is not sufficiently stated that he had notice of this particular provision, but I think it must be implied that he had notice, from the fact of his becoming a shareholder in the company.

(1) Law Rep. 6 Q. B. 155, at p. 161.

I now proceed to consider the second replication, which is silent as to the statutes or articles of association, but simply alleges that according to French law the members of the company were bound to elect a domicile; and that, according to French law, upon default a domicile would be elected for them at a public office, where process might be served, and that they would be bound thereby. I confess I cannot find a case which has gone so far as to hold a defendant liable, under such circumstances, upon a foreign judgment obtained as this was, without any knowledge on his part of the proceedings. Can it be said that an Englishman, for example, who buys a share in a foreign company on the London Stock Exchange, thereby becomes necessarily bound by any decision to which the foreign tribunal may come upon a matter affecting his interests? Suppose there had been a provision by the law of France that whenever a member neglected to elect a domicile he should pay double calls, are we to enforce his liability in an action on a judgment for such calls obtained against him without his knowledge in the foreign court? No doubt in the present case, where the law of France is in question, the probability is that the shareholder would not be subjected to any extraordinary or unjust liabilities. But if the principle of law is that which the plaintiff contends for, it must be applied in cases of countries where the law might be very much more open to objection than it is likely to be in a country such as France.

It is said, however, that the authorities upon the point are decisive, and two were especially relied on. The first was the *Bank of Australasia* v. *Harding* (1), and it is, I agree, a strong authority in support of the first replication, but not of the second. In that case there had been a local Act obtained giving power to the company's creditors to obtain judgment against a representative of all the members, and enacting that by that judgment all the members should be bound; and it was upon the circumstance that the Act existed that the judgment of the Court was founded, and nothing falls from any of the judges to indicate that they would have held the defendant bound if there had been no such Act. In their opinion the defendant was to be considered as a consenting party to the passing of the Act, or as one of the parties at whose

(1) 9 C. B. 661; 19 L. J. (C.P.) 345.

1874

COPIN v. ADAMSON.

COPIN v. STRACHAN.

request it was passed, and therefore bound by its provisions: see per Wilde, C.J., and Cresswell, J., at pp. 685, 687. In the absence of such consent, it seems to me that the Court would have come to a contrary conclusion.

The second case relied on was *Vallée* v. *Dumergue* (1), but here again, although the decision supports the first, it fails to support the second replication. There the defendant had become by transfer the owner of shares in a French company, and upon accepting the shares was bound, according to French law, to elect a domicile. He actually did so, and gave notice of his election to the company. He was, therefore, aware of what the French law was, and had complied with it. Then, having left the country, notice of process was, as here, left at the elected domicile, but never reached the defendant against whom judgment by default was recovered. It was held he was liable on the judgment, but upon the ground that he had done something more than become a shareholder in the company; he had so conducted himself as to warrant the inference that he had agreed to be bound by the decision of the foreign Court. "The replication consists," says Alderson, B. (at p. 303) "of a statement of facts which shew that by the agreement to which the defendant has become a party, no actual notice need be given to him;" and again (at p. 303) "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode has been followed, even though he may not have had actual notice of them."

For these reasons my judgment (in which my Brother Pigott concurs) is for the plaintiff upon the demurrer to the first replication, and for the defendant upon the demurrer to the second.

Judgment accordingly.

Attorneys for plaintiff: *Deane & Chubb.*
Attorneys for defendant Adamson: *Rowland & Miller.*
Attorneys for defendant Strachan: *Argles & Rawlins.*

(1) 4 Ex. 290; 18 L. J. (Ex.) 398.

END OF TRINITY TERM, 1874.

BIBL. LONDIN. UNIV.

INDEX.

ACTION—Partnership—Wrongful expulsion 190
See MUTUAL INSURANCE SOCIETY.

—— Statutory duty - - - - 125
See STATUTORY DUTY.

AGENT—Trespass - - - - 309
See HIGHWAY BOARD.

AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR - - - Ex. Ch. 307
See FRAUDS, STATUTE OF.

AMENDMENT—Claim of damages Ex. Ch. 307
See FRAUDS, STATUTE OF.

ANNUITY—Illegitimate children - Ex. Ch. 307
See FRAUDS, STATUTE OF.

—— Separation deed—Divorce - - 38
See SEPARATION DEED.

APPEAL—Costs—Interest - - - 35
See INTEREST ON JUDGMENT.

ARBITRATION—Clause in contract - 7
See ARBITRATION CLAUSE.

—— Landlord and tenant—Compensation 7
See ARBITRATION CLAUSE.

ARBITRATION CLAUSE—*Landlord and Tenant—Agreement to pay Compensation for Damage from Ground Game—"Fair and Reasonable Compensation."*] The defendant agreed with the plaintiffs, his landlords, that he would keep upon the premises demised such a number only of hares and rabbits as would do no injury to the trees or plantations of the plaintiffs, or their growing crops, or the growing crops of their tenants, and in case he should keep such a number as should do injury, would pay the plaintiffs a fair and reasonable compensation. In an action brought for breach of this agreement, the defendant pleaded that "one of the terms of the tenancy was that, in case of any such injury, the defendant would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators or an umpire; that a difference arose, and that no arbitrators or umpire were appointed, and no award made." On demurrer:—*Held*, a good plea. DAWSON *v.* LORD OTHO FITZGERALD - - 7

ASSETS WITHIN JURISDICTION - - 140
See PROBATE DUTY. 1.

ASSIGN, COVENANT NOT TO - - 151
See COVENANT NOT TO ASSIGN.

BANKRUPTCY ACT, 1869, s. 87 - - 147
See EXECUTION CREDITOR.

BANKRUPTCY—Execution—Payment - 147
See EXECUTION CREDITOR.

BILL OF EXCHANGE—Probate duty - 140
See PROBATE DUTY. 1.

BILL OF LADING—Weight of goods - 74
See WEIGHT IN BILL OF LADING.

BILLS OF LADING ACT, s. 3 - - 74
See WEIGHT IN BILL OF LADING.

BRIDGE—Plans and specifications - 163
See IMPLIED WARRANTY.

BURIAL FEE—*Selection of Site—Opening Vault—Non-parishioners—Contract.*] A vicar of a parish, being freeholder of the church and churchyard, may make a special contract for the payment of a fee, other than the customary burial fee (if any), for the burial of a non-parishioner in a particular vault in the parish church. *Ex parte Blackmore* (1 B. & Ad. 122) followed. NEVILL *v.* BRIDGER - - - - - 214

CARRIAGE TAX—Exemption - - 25
See TAX ON CARRIAGES.

CARRIER—Carriers Act—Felony by servant
See CARRIERS ACT. 2. [93

—— Carriers Act—Parcel or package - 67
See CARRIERS ACT. 1.

—— Common carrier—What is - Ex. Ch. 338
See COMMON CARRIER.

—— Refusal by consignee—Charges - 132
See REFUSAL OF GOODS BY CONSIGNEE.

CARRIERS ACT—*Carrier*—11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68, *ss.* 1, 2—"*Parcel or Package.*"] The plaintiff sent upon a truck by the defendants' line a waggon with wooden sides, but without a top, in which he packed, amongst other things, paintings exceeding the value of 10*l.*, which were so placed in the waggon that it could be seen that they were paintings, but their exact character could not be seen. In an action for injury to the paintings:—*Held*, that the waggon, with its contents, was a "parcel or package" within the Carriers Act, s. 1, and that, the goods not having been declared, the plaintiff could not recover. WHAITE *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - - - 67

2. —— 11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68, *s.* 8—*Felony of Carriers' Servants—Evidence.*] In an action against carriers for loss of the plaintiff's goods, upon an issue that the loss arose from the felonious acts of the defendants' servants, it is sufficient to prove facts which render it more probable that the felony was committed by some one or other of the defendants' servants than by any one not in their employment; and it is unnecessary to give such evidence as would suffice to convict any particular servant. VAUGHTON *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - - - 93

CASES—*Blisset v. Daniel* (10 Hare, 493) followed - - - - 190
See Mutual Insurance Society.
—— *Bonomi* v. *Backhouse* (9 H. L. C. 503) considered - - - -
See Covenant for Title.
—— *Cossey* v. *London, Brighton, & South Coast Ry. Co.* (Law Rep. 5 C. P. 146) followed
See Production of Documents. [298
—— *Ex parte Blackmore* (1 B. & Ad. 122) followed - - - - 214
See Burial Fee.
—— *Ex parte Brooke* (Law Rep. 9 Ch. 301) followed - - - - 147
See Execution Creditor.
—— *Fletcher* v. *Rylands* (Law Rep. 2 H. L. 330) considered - - - Ex. Ch. 64
See Duty of Owner of Land.
—— *Young* v. *Macrae* (3 B. & S. 264) distinguished - - - - 218
See Libel.
"CATTLE" - - - - - 176
See Duty to fence. 2.
CHEAP TRAINS ACT, ss. 6, 8, 9 - - 330
See Passenger Duty.
CHURCHYARD—Burial fee - - 214
See Burial Fee.
COLLECTION OF WATER - - Ex. Ch. 64
See Duty of Owner of Land.
COMMITTAL UNDER DEBTORS ACT, 1869, s. 5—*Order of Commitment—Lapse of more than one Year between Order and Arrest—Common Law Procedure Act*, 1852, *s.* 124.] An order of commitment by a superior court under the Debtors Act, 1869, s. 5, need not be executed within a year from its date, but remains in force as long as the judgment which it is issued to enforce.
Hermitage v. Kilpin - - - 205
COMMON CARRIER—*Fixed Termini—Definite Route—Conveyance of a Single Customer's Goods—Barge-owner.*] The defendant was a barge-owner, and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure. In an action against the defendant by the plaintiffs for not safely and securely carrying certain goods:—*Held*, affirming the judgment of the Court below, that the defendant in exercising this employment had incurred the liability of a common carrier, and was liable though the goods were lost without negligence on his part.—By Brett, J. The defendant was not a common carrier nor liable as such, but was liable as a ship-owner carrying goods for hire, upon the custom applicable to him as such. The Liver Alkali Company *v.* Johnson - Ex. Ch. 338
COMMON SEAL—Contract—Corporation - 13
See Contract by Corporation. 1.
—— Corporation—Contract - - - 322
See Contract by Corporation. 3.
COMPANIES ACT, 1862, ss. 8, 9, 10, 12. [Ex. Ch. 224
See Contract by Corporation. 2.
COMPANY—Contract—Ultra vires Ex. Ch. 224
See Contract by Corporation. 2.
—— Foreign—Elected domicile - - 345
See Foreign Judgment.
COMPENSATION—Damage by game - 7
See Arbitration Clause.
CONSIGNEE—Refusal of goods - - 132
See Refusal of Goods by Consignee.
CONTAGIOUS DISEASES (ANIMALS) ACT, 1869
See Statutory Duty. [125
CONTRACT—Burial fee - - - 214
See Burial Fee.
—— Company—Ultra vires - Ex. Ch. 224
See Contract by Corporation. 2.
—— Corporation—Common seal - - 13
See Contract by Corporation. 1.
—— Corporation—Seal - - - 302
See Contract by Corporation. 3.
—— Plans and specifications - - 163
See Implied Warranty.
—— Service—Notice - - - 57
See "Twelve Months certain."
—— Statute of Frauds - Ex. Ch. 307
See Frauds, Statute of.
CONTRACT BY CORPORATION—*Common Seal—Mutuality—Executory Contract—Part Performance—Ratification.*] The plaintiffs, a municipal corporation and local board, on the 17th of July, caused certain tolls to be put up for letting by auction, under conditions by which the purchaser was immediately on the fall of the hammer to pay a month's rent in advance, and to produce two sureties, who were forthwith to sign the conditions and a draft lease. The defendant was the highest bidder at the auction, and was declared the purchaser, and he paid a month's rent in advance, and signed an agreement to become lessee indorsed on the conditions; but he did not then, nor at any subsequent time, produce two sureties; and the plaintiffs ultimately, in pursuance of the conditions, determined the contract, and sold the tolls at a loss. The contract was not executed by the plaintiffs under their common seal, nor signed on their behalf by any person authorized under seal to do so. After the sale, the plaintiffs, on the 7th of August, by resolution, which was entered on the minutes under seal, adopted the report of a committee, to the effect that the tolls had been put up to auction, and that the defendant had become the purchaser at a rent of 350*l.* and had paid a deposit of 29*l.* 3*s.* 4*d.* Before this, however, the defendant had, on the 4th of August, written to the plaintiffs saying that he could not carry out his contract, and asking for a return of the sum paid. In an action brought against the defendant to recover damages for the breach of his agreement to take the tolls:—*Held*, that the contract was one that required to be made under the plaintiffs' common seal; that not having been sealed by the plaintiffs, nor signed by any person authorized under seal by them to do so, the defendant was not bound by it; that the payment of a month's rent in advance was not such a part performance as would have bound the plaintiffs in equity specifically to perform their agreement; and that the resolution of the 7th of August (even assuming

it to be a ratification under seal of the contract) came too late. The Mayor, &c., of Kidderminster *v.* Hardwick - - - - 13

2. —— *Company—Memorandum of Association—Contracts ultra vires—Ratification—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 9, 10, 12.] The defendants were incorporated as a limited company under the Companies Act, 1862, the objects of the company, as stated in the memorandum of association, being, "To make, sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell as merchants timber, coal, metal, and other materials, and to buy and sell any such materials on commission as agents." And by art. 4 of their articles of association, "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association, shall take place only in pursuance of a special resolution."—The defendants' directors in January, 1865, entered into contracts on behalf of the company, by which the company became purchasers of a concession granted by the Belgian government for the construction of a railway in Belgium, and contracted with the plaintiff that, through the medium of a société anonyme which the company were to form in Belgium, he should be employed to construct the line, and that they would pay certain sums of money into the treasury of the société anonyme for the purpose of payments being made to him thereout for the construction of the railway. These contracts were afterwards modified in certain particulars by agreements entered into in October, 1865, by the directors on behalf of the company.—In October, 1865, the plaintiff entered on the construction of the line; the société anonyme was formed, and for some time payments were made by the company into the treasury of the société in pursuance of their contract with the plaintiff.—In October, 1865, the directors, being advised that these contracts were ultra vires, projected a company to take them over. At a general meeting of the company held in November, 1865, a balance sheet was presented shewing advances on account of the Belgian contracts: objections were raised to this item, but an assurance having been given by the chairman that it would not appear again, but would be taken over by the proposed company, a resolution approving and adopting the accounts was passed.—On the 20th of December, 1866, an extraordinary general meeting of the company was held, and a committee was appointed to inquire into the company's affairs. The committee reported to an extraordinary meeting, held on the 1st of May, 1867, that the Belgian contracts were ultra vires, that they did not bind the company, and that the directors were liable to replace the moneys expended, but recommended an amicable settlement. A committee was appointed in pursuance of this recommendation, and, at an annual meeting held on the 14th of May, 1867, the circular convening which mentioned as part of the business of the

meeting, the consideration and adoption of any report to be made by the committee (and when the advances on the Belgian contracts again appeared in the balance sheet), a resolution was passed, adopting a recommendation of the committee to the effect that certain persons (directors of the company) should "purchase" from the company the Belgian contracts, the company undertaking to take any legal proceedings necessary to enforce the contracts, at the expense and on the indemnity of the purchasers, and reserving their right to maintain that the contracts were ultra vires and not binding on the company; and subject to this resolution the balance sheet was approved.—At another annual meeting, held on the 24th of December, 1867, a formal contract carrying out the resolution of the 14th of May (and which was referred to in the circular convening the meeting) was sanctioned, and the seal of the company affixed, and the entry of "advances" in the balance sheet was altered to "advances to be refunded in accordance with a resolution passed at a meeting of shareholders on the 14th of May, 1867."—In May, 1866, the company repudiated the contracts as being ultra vires.—In an action brought by the plaintiff to recover damages against the company for not continuing to make payments in pursuance of the contracts of January and October, 1865:—*Held* (in the Court of Exchequer), first, that the contracts were ultra vires. Secondly (by Martin and Channell, BB.; Bramwell, B., dissenting), that they had been ratified by the shareholders. Error being brought:—*Held*, that the contracts were ultra vires. By Blackburn, Brett, and Grove, JJ., first, that the contracts, though beyond the scope of the memorandum of association, were capable of ratification by the individual shareholders, and, secondly, that they had been so ratified. By Keating, Archibald, and Quain, JJ., first, that the contracts, being beyond the scope of the memorandum of association, were incapable of ratification; secondly, that there was no evidence that they had been in fact ratified by all the shareholders. Riche *v.* The Ashbury Railway Carriage and Iron Company, Limited - - Ex. Ch. 224

3. —— *Corporation acting as Local Board—Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *s.* 24—*Seal.*] The defendants, a municipal corporation, having, by transfer from a body of commissioners, power to purchase certain gas works, and being also a local board, took proceedings for the purpose of purchasing the works and assessing the price by arbitration. In pursuance of a resolution passed at a meeting of a sub-committee appointed for the management of the business, the report of which was adopted by the council, the plaintiff was employed as a witness on the arbitration to support the evidence of the defendants' valuer. No appointment of the plaintiff under seal was made, but he acted as witness under the instructions of the valuer, who was so appointed.—In all these proceedings the defendants erroneously described themselves as "acting as the local board," and their seal as "the seal of the local board;" but it did not appear that the seal of the local board was any other than the municipal seal.—In an action brought by the

CONTRACT BY CORPORATION—*continued.*
plaintiff against the corporation for his services as witness:—*Held*, that the municipal corporation and the local board could not be treated as independent bodies; that the plaintiff's contract was in substance with the corporation; and that he was entitled to recover. ANDREWS *v.* MAYOR, &c., OF RYDE - - - - - 302

CONTRIBUTORY NEGLIGENCE—Railway bridge
See EVIDENCE OF NEGLIGENCE. [71

CONVERSION—Evidence—Appropriation 86
See EVIDENCE OF CONVERSION.

CONVERSION, TRUST FOR—Probate duty 29
See PROBATE DUTY. 2.

CORPORATION—Contract—Common seal 13
See CONTRACT BY CORPORATION. 1.

—— Contract—Seal - - - 302
See CONTRACT BY CORPORATION. 3.

—— Contract—Ultra vires - Ex. Ch. 224
See CONTRACT BY CORPORATION. 2.

—— Trespass - - - - 319
See HIGHWAY BOARD.

COSTS—Judgment—Interest - - 35
See INTEREST ON JUDGMENT.

COVENANT FOR QUIET ENJOYMENT - 99
See COVENANT FOR TITLE.

COVENANT FOR TITLE—*Quiet Enjoyment—Continuing Breach—Statute of Limitations* (3 & 4 *Wm.* 4, *c.* 42), *s.* 3—*Minerals—Support.*] In 1844 the defendant was party to a twenty-one years' lease of coal mines, which gave certain powers over the surface incidental to the working of those mines and an adjoining colliery. The coals so demised were substantially worked out before September, 1845. In October, 1845, the defendant sold and conveyed the land to J., who knew of the workings, and the defendant covenanted with him for title, for quiet enjoyment, and against incumbrances. In July, 1846, J. sold and conveyed to the plaintiff, who was ignorant of the workings. In 1865, in consequence of the mining operations above described, the land subsided, and houses built on it by J. and the plaintiff were damaged. —In 1848, subsequently to the plaintiff becoming owner of the land, and within twenty years before action, the lessees, or persons acting under their authority, entered the mines and took some fire-clay (which was not included in the demise) and a few loose pieces of coal.—In an action brought on the above covenants, the declaration in which alleged that *whilst the plaintiff was seised* the lessees entered upon the land, and worked, got, and carried away the coal, whereby the plaintiff lost the coal, and the land subsided:—*Held* (by the Court), that as to the breach of the covenant for quiet enjoyment by the removal of coal which caused the subsidence, there was a fatal variance between the declaration and the evidence, which under the circumstances the Court declined to amend.—By Bramwell and Cleasby, BB. First, that the fact of the coals having been worked out was no breach of the covenant for title, J. never having bought those coals; that the subsistence of the lease in respect of the coal left unwrought and the powers (not exercised) incident to the working of other collieries, did not constitute a breach; that the breach (if any) was complete in the time of J., and (by Bramwell, B.) that the

COVENANT FOR TITLE—*continued.*
action was barred by the Statute of Limitations. —Secondly, that neither the acts of trespass in taking the fire-clay in 1848 nor the subsidence caused in 1865 by the workings in 1845, were breaches of the covenant for quiet enjoyment, on the ground that the first was a mere trespass, and that as to the second, the subsidence gave no new cause of action; the principle of *Bonomi* v. *Backhouse* (9 H. L. C. 503) not applying to a case where the subsidence is caused by a wrongful taking of the plaintiff's minerals.—By Kelly, C.B. First, that the subsistence of the lease was a continuing breach of the covenant for title, in respect of which the plaintiff was entitled to nominal damages.—Secondly, that the removal of the small pieces of coal, in 1848, was a breach of the covenant for quiet enjoyment, in respect of which the plaintiff was also entitled to nominal damages.—Thirdly, that the removal of the coal by the lessees being lawful, the subsidence in 1865 gave a new cause of action to the plaintiff. SPOOR *v.* GREEN 99

COVENANT NOT TO ASSIGN—*Landlord and Tenant—Arbitrary Refusal—Qualified Covenant.*] A lessee covenanted with the lessor not to assign the demised premises without the consent in writing of the lessor, "such consent not being arbitrarily withheld;" and it was provided by the lease that if the lessee should assign the premises without the consent in writing of the lessor, "but such consent is not to be arbitrarily withheld," the lessor might re-enter:—*Held*, that there was no covenant by the lessor, either express or implied, not to refuse his consent arbitrarily, but that an arbitrary refusal would leave the lessee at liberty to assign without the lessor's consent.—*Semble*, by Kelly, C.B., and Pollock, B. An "arbitrary" refusal is equivalent to an "unfair and unreasonable" refusal; and a refusal "upon advice," though the grounds of refusal be not specified, is not "arbitrary." TRELOAR *v.* BIGGE [151

COVENANT TO PAY "OUTGOINGS"—*Landlord and Tenant—Duty to make Drain.*] In a lease of a house and premises by defendant to plaintiff, the plaintiff covenanted with the defendant to "bear, pay, and discharge the sewers rate, tythes, rent-charge in lieu of tythes, and all other taxes, rates, assessments, and outgoings whatsoever which at any time or times during the said demise should be taxed, rated, charged, assessed, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved" (excepting landlord's property tax):—*Held*, that the plaintiff could not recover from the defendant the expenses of making a drain, which, under 29 & 30 Vict. c. 90, s. 10, the defendant, as "owner," might have been required by the sewer authority to make, but which the plaintiff had made under an arrangement with the defendant by which the expense was to be borne by the party liable. CROSSE *v.* RAW - - - - 209

DEBTORS ACT, 1869, s. 5 - - - 205
See COMMITTAL UNDER DEBTORS ACT, 1869.

DEED OF SEPARATION - - - 38
See SEPARATION DEED.

DEFAMATION—Privilege—Election - 79
See Privileged Communication.

DISCOVERY—Documents - - - 298
See Production of Documents,

—— Title - - - - - 45
See Interrogatories as to Title.

DISPARAGING STATEMENT AS TO GOODS 218
See Libel.

DISTRESS—Lands not demised - Ex. Ch. 185
See Distress on Lands not demised.

DISTRESS ON LANDS NOT DEMISED—*Landlord and Tenant—Rent-charge—Mines—Notice.*] Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall for the time being be in course of working by the lessees, their executors, administrators, and assigns. The plaintiffs, being assignees of the lease with notice, under a trust deed made by the lessees for the benefit of creditors, sued the defendants for a distress made under the above-mentioned power, after the assignment, at pits not included in the demise, but referred to in it, and then worked by the lessees:—*Held*, that, whether the power was or was not a valid power of distress against strangers, the plaintiffs, taking as assignees with notice, were bound by it. Daniel *v.* Stepney Ex. Ch. 185

DOCUMENTS—Discovery—Privilege - 298
See Production of Documents.

DRAIN—Expenses—Landlord and tenant - 209
See Covenant to pay "Outgoings."

DUTY OF OWNER OF LAND—*Trespass—Collecting Water—Mining.*] The defendants' mines adjoined and communicated with the plaintiff's; and in the surface of the defendants' land were certain hollows and openings, partly caused by and partly made to facilitate the defendants' workings. Across the surface of their land there ran a watercourse, which, in the year 1865, was diverted by them into another channel. In November, 1871, the banks of the watercourse (which were sufficient for all ordinary occasions) burst in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks passed into the defendants', and so into the plaintiff's, mines. If the land had been in its natural condition the water would have spread itself over the surface and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines.—At the trial of an action brought by the plaintiff to recover the damage he had sustained, the learned judge directed a verdict for the plaintiff, holding that the case was governed by *Fletcher* v. *Rylands* (Law Rep. 3 H. L. 330), and that the defendants were absolutely liable; and rejecting evidence offered by the defendants that every reasonable precaution had been taken to guard against ordinary emergencies:—*Held* (reversing the judgment of the Court below), that the case was not beyond all question governed by *Fletcher* v. *Rylands* (Law Rep. 3 H. L. 330), that the water coming from the natural overflow and that coming from the diversion of the watercourse might possibly admit of different considerations; that if the evidence tendered had been received, there might have been questions for the jury, and that under all the circumstances there ought to be a new trial.—The opinion of the jury at such trial ought to be taken as to whether what was done by the defendants was done by them in the ordinary, reasonable, and proper mode of working the mine. Smith *v.* Fletcher - - - Ex. Ch. 64

DUTY TO FENCE—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 47, 61—26 & 27 *Vict. c.* 92, *s.* 6—*Public Footpath crossed on the Level—Evidence of Negligence.*] The defendants' line crossed a public footpath on the level; but the defendants had not erected any gate or stile, as provided by 8 & 9 Vict. c. 20, s. 61.—The plaintiff, a child of four years and-a-half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train:—*Held*, that there was evidence to go to the jury that the accident was caused [by the neglect of the defendants to fence. Williams *v.* The Great Western Railway Company - - 157

2. —— *Straying Animals—Railway—Negligence—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 68—"*Cattle.*"] The plaintiff, a platelayer in the employment of a railway company, was returning from his work along their line upon a trolly propelled by hand, when the defendant's pigs got through the fence of his field, which adjoined the railway, on to the line in front of the trolly; the trolly ran over the pigs and was upset, and the plaintiff was injured.—The defendant was owner of the adjoining land; the fence erected by the company under 8 Vict. c. 20, s. 68, was sufficient against horses, oxen, and sheep; but there was enough space between the lowest rail of the fence and the ground for pigs to crawl through, and the defendant's pigs had in fact (as the jury found) crawled under the fence. There was evidence to shew that the defendant had been warned on a former occasion of his pigs being on the line, but there was no evidence to shew how the pigs got from defendant's farm yard, where they were last seen, into the field adjoining the railway. In an action against the defendant for the injury sustained by the plaintiff:—*Held*, first, that the word "cattle" in 8 Vict. c. 20, s. 68, included pigs, and that the fence was, therefore, insufficient.—Secondly, that, assuming there was negligence in the defendant, the plaintiff could not recover, for that he was identified with the company whose line he was using for their purposes, and through whose neglect to erect and maintain a sufficient fence the accident was caused. Child *v.* Hearn - 176

ELECTED DOMICILE—Foreign company - 345
See Foreign Judgment.

ELECTION—Communication between agents 79
See Privileged Communication.

ENGINEERING CONTRACT—Plans and specifications - - - 163
See Implied Warranty.

ESTOPPEL—Bill of lading - - - 74
See Weight in Bill of Lading.

EVIDENCE—Felony by servant - - 93
See Carriers Act. 2.

EVIDENCE OF CONVERSION — *Goods sent by Mistake — Intention to appropriate the Goods.*] The plaintiffs sent to the defendant an invoice for barley, which stated that the barley was bought by the defendant of the plaintiffs through G. as broker, and also a delivery order, which made the barley deliverable to the order of the consignor or consignee. The defendant had not in fact ordered any barley of the plaintiffs. G. called on the defendant, who shewed him the documents, and told him it was a mistake. G. said it was so, and asked the defendant to indorse the order to him, for the purpose, as he said, of saving the expense of obtaining a fresh delivery order. The defendant indorsed the order to G., who possessed himself of the barley and disposed of it, and then absconded.—On the trial of an action of trover for the barley, the jury found that the defendant had no intention of appropriating the barley to his own use, but indorsed the order for the purpose of correcting what he believed to be an error, and returning the barley to the plaintiffs :—*Held*, that the defendant, having indorsed the order without any occasion to do so, and without authority, was liable. Hiort *v.* Bott 86

EVIDENCE OF NEGLIGENCE — *Contributory Negligence — Railway Bridge.*] The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was crossed by a bridge, and on to which the defendants were in the habit of conveying the plaintiffs' trucks from their line, the plaintiffs removing them thence as they thought fit. The defendants brought on to the plaintiffs' siding and left there, after working hours, trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at plaintiffs' works, the defendants, after dark, pushed on to the siding other trucks of the plaintiffs, and pushed the loaded truck up to the bridge, by which means the train of trucks was arrested. The defendants' servants, not being aware of the cause of the obstruction, pushed the train of trucks forward with so much force that the loaded truck knocked down the bridge. In an action for the damage so done, the jury having found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck :—*Held*, that there was no evidence of contributory negligence to go to the jury. Radley *v.* The London and North-Western Railway Company - - 71

—— Fences - - - - 157, 176
See Duty to fence. 1, 2.

EXECUTION—Reasonable time - - 121
See Issue of Execution.

EXECUTION CREDITOR—*Bankruptcy Act*, 1869, *s.* 87—*Seizure and Sale—Payment to Sheriff to avoid Sale—"Proceeds of such Sale."*] The sheriff having seized the goods of a trader debtor under an execution for more than 50*l.*, the debtor, before sale, paid him, on the 18th of November and the 21st of November, two sums of 100*l.* and 32*l.* respectively, on account of the debt. The judgment creditors knew of and assented to the payments. The debtor, on the 24th of November, filed a petition for liquidation, and a restraining order was served on the sheriff, who continued to hold the sums so paid on account. Subsequently, on the 20th of December, trustees were appointed, who claimed the 132*l.* :—*Held*, that the judgment creditors, having assented to the payments, were entitled to the money as against the trustees. *Ex parte Brooke* (Law Rep. 9 Ch. 301) followed. Stock *v.* Holland - - - - 147

EXEMPTION FROM TAX—Carriage - 25
See Tax on Carriages.

EXPULSION FROM PARTNERSHIP—Action 190
See Mutual Insurance Society.

FEE—Burial—Contract - - - 214
See Burial Fee.

FELONY BY SERVANT—Carrier - - 93
See Carriers Act. 2.

FENCES—Railway - - - 157, 176
See Duty to fence. 1, 2.

FOREIGN BILL OF LADING - - 74
See Weight in Bill of Lading.

FOREIGN COMPANY—Elected domicile - 345
See Foreign Judgment.

FOREIGN CONTRACT—Bill of lading - 74
See Weight in Bill of Lading.

FOREIGN JUDGMENT — *Liability of English Shareholder in a Foreign Company — Effect of taking Shares—Agreement to submit to Jurisdiction —Service of Notice at elected Domicile.*] To an action on a French judgment, the defendant pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the Court, or subject to French law; that he was never served with any process; nor had any notice or opportunity of defending himself.—Replications : (1.) That the defendant was holder of shares in a French company, having its legal domicile at Paris, and became, thereby, subject, by the law of France, to all the liabilities, &c., belonging to holders of shares, and, in particular, to the conditions contained in the statutes or articles of association; that by these statutes it was provided and agreed that all disputes arising during liquidation between shareholders should be submitted to the jurisdiction of the French court; that every shareholder provoking a contest must elect a domicile, and, in default, election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated; and that all summonses, &c., should be validly served at the domicile formally or impliedly chosen; that the company became bankrupt, and defendant's unpaid calls became payable to the plaintiff, as assignee; that he made default and provoked a contest; that he never elected a domicile, and thereupon the plaintiff caused summonses, &c., to be served at the office aforesaid; that by the law of France that office was the defendant's implied domicile of election for the purpose of service, and the service was regular; and that the defendant was bound to appear, but did not, whereupon judgment by default was recovered against him. (2.) A similar replication, alleging that defendant

FOREIGN JUDGMENT—*continued.*
was a shareholder as in the 1st replication mentioned, and stating provisions of the law of France to the same effect as those contained in the abovementioned statutory articles of association, but omitting all reference to the statutes or articles of association, and alleging that defendant did not elect a domicile, and also that the company became bankrupt, &c., and that a summons was served as in the 1st replication stated. On demurrer:—*Held*, that the 1st replication was good, and (by Amphlett and Pigott, BB., Kelly, C.B., dissenting) that the 2nd replication was bad. Copin *v.* Adamson. Copin *v.* Strachan [345

FOREIGN LAW—Judgment - - - 345
See Foreign Judgment.

FRAUDS, STATUTE OF—*Statute of Frauds, s.* 4 —*Agreement not to be performed within a Year—Contract for Support of Illegitimate Children—Annuity—Executed Consideration.*] The defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her verbally to pay her 300*l.* per annum, by equal quarterly instalments, for so long as she should maintain and educate the children. At the time of the making of the promise the eldest child was about fourteen years old. For several years the plaintiff maintained and educated the children, and the defendant paid the agreed sums. At Michaelmas, 1870, he discontinued his payments. The plaintiff continued to maintain and educate the children, and in May, 1873, brought an action for two and a half years' arrears:—*Held*, affirming the judgment of the Court of Exchequer, that, the consideration being executed, she was entitled to recover as for "money paid at the defendant's request," at the rate fixed by the verbal agreement, even assuming that the agreement was one "not to be performed within a year." Knowlman *v.* Bluett - - - 1; Ex. Ch. 307

GOODS—Defamatory statement as to - 218
See Libel.

GOODS SENT BY MISTAKE—Conversion - 86
See Evidence of Conversion.

GROUND GAME—Damage—Compensation 7
See Arbitration Clause.

HIGHWAY—Surveyor—Trespass - - 309
See Highway Board.

HIGHWAY BOARD—*Trespass—Highway Board —Surveyor — Individual Corporators — Personal Liability—5 & 6 Wm.* 4, *c.* 50—25 *& 26 Vict. c.* 61.] The members of a highway board upon an allegation that a path across the plaintiff's field was a public highway, by a resolution passed at a board meeting, directed their surveyor to remove an obstruction placed across it by the plaintiff. The following day they gave him an order in writing to the same effect. He removed the obstruction accordingly, and the plaintiff thereupon brought an action of trespass against the members of the board who had concurred in the resolution and the surveyor. There was no evidence that the path in question was a highway:—*Held* (by Pigott and Cleasby, BB., Kelly, C.B., dissenting), that the action was maintainable.—By Pigott and Cleasby, BB. First, that the resolution was unlawful altogether, inasmuch as

HIGHWAY BOARD—*continued.*
it was beyond the province of the highway board, as a corporate body, to determine whether the path was a highway or not, and to direct the removal of an obstruction, and that the members who concurred in the resolution were therefore personally liable.—Secondly, that the circumstance that the surveyor was by 25 & 26 Vict. c. 61, s. 16, bound to obey the orders of the board did not excuse him if in obeying their orders he did an unlawful act.—By Kelly, C.B. First, that the action should have been brought against the board, the resolution and order having been corporate acts and within the competence of the board to perform, as being charged with the duty of maintaining the highways of their district in repair.—Secondly, that the surveyor, being bound by statute to obey the orders of the board, was exempt from liability as being a mere ministerial officer. Mill *v.* Hawker - 309

HUSBAND AND WIFE—Separation deed—Divorce - - - - - 38
See Separation Deed.

IMPLIED WARRANTY—*Engineering Contract—Plans and Specification—Mode of Construction—Impossibility of Execution in Mode specified.*] The defendants being about to erect a bridge, an engineer prepared for them, at their request, certain plans and specification both of the bridge and of the mode in which it was to be constructed. The plaintiff, on the faith of these plans and specification, and without any independent inquiry whether the work could be done as specified, entered into a contract with the defendants to do it in accordance with the terms of the plans and specification. After the plaintiff had incurred great expense, it was found that the work could not be executed in the manner specified. The plaintiff sued the defendants on the ground of an implied warranty by them that the work could be executed in the manner described in the plans and specification:—*Held*, that no such warranty could be implied. Thorn *v.* The Mayor, &c., City of London - - 163

INSPECTION OF DOCUMENTS - - 298
See Production of Documents.

INSURANCE SOCIETY—Expulsion - 190
See Mutual Insurance Society.

INTEREST—Judgment—Costs - - 35
See Interest on Judgment.

INTEREST ON JUDGMENT—*Costs—Interest upon Judgment for Costs in Cause—Interest upon Costs in Courts of Appeal.*] By a rule of Trinity Term, 1867, it is ordered that on appeal from one of the Superior Courts, such Court shall have power to allow interest for such time as execution has been delayed by the proceedings in appeal for the delaying thereof:—*Held*, that in a case where a defendant had obtained judgment for his costs, against which judgment there had been unsuccessful appeals to the Exchequer Chamber and House of Lords, interest could be allowed only upon the sum for which judgment was originally obtained in the Court below, and not upon the costs of the appeals. The Lancashire and Yorkshire Railway Company *v.* Gidlow 35

INTERROGATORIES—Title - - 45
See Interrogatories as to Title.

INTERROGATORIES AS TO TITLE—*Discovery of Title—Character of Defendant's Title—Quality of his Possession—Tithe Rent-charge—Apportionment Agreement*—6 & 7 *Wm.* 4, *c.* 71.] Where the defendant's title to a hereditament is in controversy, interrogatories as to the character of his title and the quality of his possession will be allowed, although interrogatories as to the mode in which he proposes to prove his title would be inadmissible.—The plaintiff, who was the rector of a parish, claimed in an action for money had and received against the patron of the living, one half of the rent of the churchyard and of the tithe rent-charge which had been received by the patron since the plaintiff's induction. The defendant having pleaded a title by prescription, and also, as to the rent-charge, an agreement under 6 & 7 Wm. 4, c. 71, whereby it was agreed that the tithes should be commuted, and that the substituted rent-charge should be received in equal shares by the then rector and himself, the plaintiff was permitted to administer interrogatories as to the period for which the defendant and his predecessors had received the rent and tithes, or tithe rent-charge, and as to the circumstances under which they had so received them. TOWNE *v.* COCKS - - - - 45

ISSUE OF EXECUTION—*Judgment—Execution—Reasonable Time.*] A party who has signed judgment is entitled to issue execution without waiting for a return of post.—*Semble*, he is entitled to issue execution immediately, and is not bound to wait a reasonable time. SMITH *v.* SMITH 121

JUDGMENT—Execution—Reasonable time 121
See ISSUE OF EXECUTION.

—— Foreign - - - - - 345
See FOREIGN JUDGMENT.

—— Interest—Costs - - - - 35
See INTEREST ON JUDGMENT.

LANDLORD AND TENANT - - - 185
See DISTRESS ON LANDS NOT DEMISED.

—— Covenant not to assign - - 151
See COVENANT NOT TO ASSIGN.

—— Covenant to pay "outgoings" - 209
See COVENANT TO PAY "OUTGOINGS"

—— Game—Compensation - - - 7
See ARBITRATION CLAUSE.

—— Occupation—Yearly tenancy - - 50
See OCCUPATION UNDER VOID DEMISE.

LEE RIVER NAVIGATION IMPROVEMENT ACT - - - Ex. Ch. 60
See PENSION.

LEVEL CROSSING—Negligence - - 157
See DUTY TO FENCE. 1.

LIBEL — *Defamation — Disparaging Statement about Goods—False and Malicious Publication.*] The defendants falsely and without lawful occasion, published a statement disparaging the quality of the plaintiffs' goods, and special damage resulted from the publication:—*Held*, actionable.—*Young* v. *Macrae* (3 B. & S. 264; 32 L. J. (Q.B.) 6) distinguished. THE WESTERN COUNTIES MANURE COMPANY *v.* THE LAWES CHEMICAL MANURE COMPANY - - - - 218

—— Election—Agents - - - 79
See PRIVILEGED COMMUNICATION.

LIEN—Carrier—Charges - - - 132
See REFUSAL OF GOODS BY CONSIGNEE.

—— Unpaid purchase-money—Trover - 54
See RIGHT TO BRING TROVER.

LIMITATIONS, STATUTE OF - - 99
See COVENANT FOR TITLE.

LOCAL BOARD—Contract—Seal - - 302
See CONTRACT BY CORPORATION. 3.

LOCAL GOVERNMENT ACT, 1858, s. 24 - 302
See CONTRACT BY CORPORATION. 3.

MARRIED WOMAN—Separation deed - 38
See SEPARATION DEED.

MASTER AND SERVANT—Contract—Notice 57
See "TWELVE MONTHS CERTAIN."

MEMORANDUM OF ASSOCIATION — Contract ultra vires - - - Ex. Ch. 224
See CONTRACT BY CORPORATION. 2.

MINERALS—Support - - - 99
See COVENANT FOR TITLE.

MINES—Pollution of water - - Ex. Ch. 64
See DUTY OF OWNER OF LAND.

—— Distress - - - - - 185
See DISTRESS ON LANDS NOT DEMISED.

MUTUAL INSURANCE SOCIETY—*Partnership—Wrongful Expulsion.*] Declaration, alleging that the plaintiff was a member of a mutual insurance society, which insured members against losses to ships entered and insured in the books of the society, on a deposit being made of 5*l.* per cent. on the amount insured; that the defendants were the committee of the society, by the rules of which they had the entire control of the funds and affairs of the society, and were to determine on the admission or rejection of ships insured or proposed for insurance; that by another rule, "if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member, by directing the secretary to give such member notice in writing that the committee have excluded such member from the society, and, after the giving of such notice, such member shall be excluded, and have no claim or be responsible for or in respect of any loss or damage happening after such notice;" that the plaintiff, as such member, had entered a ship on the books of the society, and had paid the deposit, and was thereupon entitled to an indemnity for loss happening to the ship; that the defendants, well knowing the premises, but "wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity, did wrongfully, collusively, and improperly expel the plaintiff from the society on the alleged ground that his conduct was suspicious, or that he was for some reason unworthy of remaining in the society, without giving the plaintiff, or any person on his behalf, any opportunity whatsoever of being heard before them, and without, in fact, hearing the plaintiff, or any person on his behalf, in defence and vindication of the plaintiff's conduct as a member of the society with reference to the said ground of expulsion"; whereby the plaintiff lost the benefit of an indemnity for damage which his ship subsequently sustained, and was otherwise damnified. Demurrer:—*Held*, that the decla-

MUTUAL INSURANCE SOCIETY—*continued.*
ration shewed no cause of action.—By Kelly, C.B., Pollock and Amphlett, BB. (following *Blisset* v. *Daniel*, 10 Hare, 493), on the ground that, assuming the allegations of the declaration to be true, the act of the defendants in expelling the plaintiff without giving him an opportunity of being heard was void; that the plaintiff, therefore, still remained a member of the society, and had sustained no damage.—By Cleasby and Pollock, BB., on the ground that the declaration did not sufficiently charge mala fides.—*Quære*, by Cleasby and Amphlett, BB., whether any action would lie against the defendants for acts done by them in the discharge of their functions as members of the committee. Wood *v.* Woad - 190

NEGLIGENCE—Evidence—Fence - 157, 176
See Duty to fence. 1, 2.

—— Evidence—Railway bridge - - 71
See Evidence of Negligence.

NOTICE—Master and servant - - 57
See "Twelve Months certain."

NOTICE OF TRIAL — *Practice — Taking short Notice of Trial "if necessary"—Meaning of "if necessary."*] Where a defendant is under terms to take short notice of trial "if necessary," the plaintiff is entitled to give such notice if he cannot, using reasonable diligence, give full notice, although the regular course of pleading was not such as to render short notice necessary. Pretty *v.* Nauscawen - - - - - 42

OCCUPATION UNDER VOID DEMISE—*Landlord and Tenant—Terms applicable to a yearly Tenancy.*] By an agreement not under seal, the plaintiff agreed to let to the defendant, and the defendant to take of the plaintiff, a house and premises for seven years, upon the terms (amongst others) that the defendant would, in the last year of the term, paint, grain, and varnish the interior, and also whitewash and colour. The defendant entered under the agreement, and occupied and paid rent during the whole period of seven years. In an action for not painting, &c., the interior and whitewashing and colouring in the seventh year: —*Held*, that the defendant must be taken to have occupied on the terms that, if he should continue to occupy during the whole period of seven years, he would do those things which were by the agreement to be done in the seventh year: and that he was therefore liable. Martin *v.* Smith - - - - - - - 50

ORDER OF COMMITMENT—Duration - 205
See Committal under Debtors Act, 1869.

"OUTGOINGS" - - - - 209
See Covenant to pay "Outgoings."

"PARCEL OR PACKAGE" - - - 67
See Carriers Act. 1.

PARLIAMENTARY ELECTION—Agent - 79
See Privileged Communication.

PARTNER—Wrongful expulsion - - 190
See Mutual Insurance Society.

PARTNERSHIP—Wrongful expulsion - 190
See Mutual Insurance Society.

PART-PERFORMANCE—Corporation—Contract
See Contract by Corporation. 1. [13

PASSENGER DUTY—*Railway*—(5 & 6 *Vict. c.* 79, *s.* 4)—*Cheap Trains Act* (7 & 8 *Vict. c.* 85), *ss.* 6, 8, 9—*Exemption from Duty—Third-class Passengers — Change of Carriages — Stopping at Stations—Power of Board of Trade to dispense with Conditions — Return Tickets — Workmen's Tickets.*] A train is a cheap train within s. 6 of the Cheap Trains Act (7 & 8 Vict. c. 85), and within the exemption from duty contained in s. 9, notwithstanding that the passengers are required at a junction, for the convenience of the traffic, to move from one train to another, provided there is no unreasonable detention so as to reduce the speed at which they travel below the minimum speed of twelve miles an hour, including stoppages, required by the Act.—The exemption from duty in s. 9 applies to fares by such a train not exceeding the parliamentary rate, although the tickets and carriages are not described as third-class tickets and carriages.—A train is not a cheap train within the Act, unless it stops at every ordinary passenger station; and the Board of Trade have no power under s. 8 to dispense with this requirement.—Return tickets issued at fares which, if the tickets were fully used, would not exceed the parliamentary rate, are not within the exemption of s. 9, if the fare for a single journey would exceed that rate.—*Semble*, that weekly workmen's tickets issued at fares which, if the tickets were fully used, would not exceed the parliamentary rate, would be within the exemption of s. 9, if issued to passengers travelling by a cheap train:—But, *held*, with respect to such tickets issued under a condition limiting the nature and amount of luggage to be carried without extra charge in a manner not in compliance with the conditions of s. 6, and without the dispensation of the Board of Trade under s. 8, that they were not within the exemption. Attorney General *v.* The North London Railway Company - - - - - - - 330

PENSION—*Public Servant—Power to vary Pension—Lee River Navigation Improvement Act* (13 & 14 *Vict. c. cix*).] By the Lee River Navigation Improvement Act, 1850, s. 76, it is enacted that "it shall be lawful for the trustees from time to time to pay and allow to any officer or servant of the trustees whose services may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as having regard to length of service and all the other circumstances of the case may, in the judgment of the trustees, be reasonable and proper," and to pay the same out of moneys in their hands by virtue of their special Acts: Under this section the trustees, by resolution not under seal, granted to their clerk upon his resignation of his office, an annuity of 300*l.* a year:—*Held* (reversing the decision of the Court below), that the trustees were entitled afterwards to reduce the amount of the annuity. Marchant *v.* The Lee Conservancy Board - - - Ex. Ch. 60

PLANS AND SPECIFICATIONS—Breach - 163
See Implied Warranty.

POSSESSION OF GOODS—Lien—Trover - 54
See Right to bring Trover.

PRACTICE—Short notice of trial - - 42
See Notice of Trial.

PRINCIPAL AND AGENT—Trespass - 309
See Highway Board.

PRIVILEGED COMMUNICATION—*Defamation—Communication by one Election Agent to Another—Parliamentary Election—Time for Petition—Interest or Duty.*] F. and B. were candidates at a parliamentary election. The defendants were agents of B., and on the day of the election, whilst the poll was proceeding, one of them wrote to the agent of F., stating that bribery on F.'s behalf was going on. B. was returned, and on the next day the plaintiff's name was mentioned by the same defendant to F.'s agent as that of a briber. A discussion upon the imputation ensued, which resulted in the defendants transmitting to F.'s agent on the day following a document signed by both of them, "certifying" that the plaintiff had been personally guilty of bribery.—In an action of defamation brought upon this document: —*Held*, that the occasion was not privileged.—*Quære*, whether it would have been privileged if a petition against the return of B. had been presented or contemplated, the twenty-one days during which such a petition might have been presented not having elapsed. Dickeson *v.* Hilliard - - - - - 79

PRIVILEGED DOCUMENTS—Production - 298
See Production of Documents.

PROBATE DUTY—*Assets within the Jurisdiction—Bills of Exchange.*] P., resident in India, directed his bankers there to realise certain securities and transmit the proceeds to his bankers in England. The securities were realised, and the proceeds transmitted in bills of exchange payable six months after sight, and drawn by a bank in India upon a bank in London in favour of the testator's English bankers. Whilst the bills were on their way to England, P. died in India. The bills were received by his bankers in England and were accepted, and the proceeds were in due course collected by the bankers and were received by the defendant, whom the testator had appointed his executor in England, and who had taken out probate here:—*Held*, that probate duty must be paid on the amount of the bills. The Attorney General *v.* Pratt - - - 140

2. —— *Absolute Trust for the Conversion of Land — Heir taking undisposed-of Interest in Realty.*] When a will contains an absolute trust for the conversion of land, and, by reason of the failure of the limitations of the proceeds contained in the will, the testator's heir takes the undisposed-of interest, he takes it as money, and on his death probate duty is payable upon it, although the land still remains unsold.—C. J. B. by his will directed his real estate to be converted, and the proceeds, with his personalty, to be held in trust for the payment of debts and legacies, and, as to the residue, on certain trusts which failed. The testator's heiress, M. B., became, by reason of the failure of the last-mentioned trusts, entitled to the proceeds of the real estate. She died under twenty-one, and at the time of her death the real estate was unsold:—*Held*, that the interest which M. B. took as heiress of C. J. B. was taken by her as money, and that probate duty

PROBATE DUTY—*continued.*

was payable by her administrator in respect of it. The Attorney General *v.* Lomas - 29

PRODUCTION OF DOCUMENTS—*Discovery—Inspection—Privileged Documents—Reports by medical men.*] Where an accident occurs on a railway, and the officials of the company in the course of their ordinary duty make a report to the company, whether before or after action brought, the report is not privileged. But when a claim has been made, and the company seek to inform themselves by a medical examination as to the condition of the person making the claim, the report made to them is privileged.—*Cossey v. London, Brighton, & South Coast Ry. Co.* (Law Rep. 5 C. P. 146) followed. Skinner *v.* The Great Northern Ry. Co. - - - 298

PUBLIC SERVANT—Pension - Ex. Ch. 60
See Pension.

QUIET ENJOYMENT, COVENANT FOR - 99
See Covenant for Title.

RAILWAY—Passenger duty - - 330
See Passenger Duty.

RAILWAY BRIDGE—Negligence - - 71
See Evidence of Negligence.

RAILWAY COMPANY—Fences - 157, 176
See Duty to fence. 1, 2.

—— Medical reports—Privilege - - 298
See Production of Documents.

—— Negligence - - - - 71
See Evidence of Negligence.

RATIFICATION—Company—Contract ultra vires [Ex. Ch. 224
See Contract by Corporation. 2.

REFUSAL OF GOODS BY CONSIGNEE—*Carrier—Railway Company—Failure of the Consignee to take Delivery—Lien for Charges.*] The defendant sent a horse by the plaintiffs' railway directed to himself at S. station. On the arrival of the horse at S. station at night there was no one to meet it, and the plaintiffs, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse; he was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station-master offered to pay the charges and let the defendant take away the horse; but the defendant declined and went away without the horse, which remained at the livery stable.—The plaintiffs afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm and with payment of a sum of money for his expenses and loss of time. —Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it. In an action brought to recover the amount of the charges:—*Held*, that the plaintiffs acted reasonably in putting the horse in the livery stable, and that the defendant, having refused to take the horse, was liable to the plaintiffs for all the livery charges which they had paid. The Great Northern Ry. Co. *v.* Swaffield - - 132

RIGHT TO BRING TROVER—*Action by Purchaser for Goods subject to Vendor's Lien for unpaid Purchase-money.*] The purchaser of goods which remain in the possession of the vendor subject to the vendor's lien for unpaid purchase-money cannot maintain an action of trover against a wrong-doer. Lord *v.* Price - - 54

SEAL—Contract—Corporation - - 13
See Contract by Corporation. 1.

—— Corporation—Contract - - - 302
See Contract by Corporation. 3.

SEIZURE AND SALE—Bankruptcy - 147
See Execution Creditor.

SEPARATION DEED—*Husband and Wife—Covenant to pay Annuity—Subsequent Divorce—22 & 23 Vict. c. 61, s. 5.*] By a separation deed reciting that differences existed between the defendant and his wife, and that they had agreed to separate, the defendant covenanted with trustees to pay them an annuity for his wife's support "during their joint lives and so long as they should live separate and apart." The deed contained clauses which indicated that the parties to the deed contemplated that the marriage relation would continue to exist between the defendant and his wife. In an action by the trustees for arrears of the annuity:—*Held*, that a plea setting forth the deed and alleging the wife's subsequent adultery, and the dissolution of the marriage in consequence, was bad, there being no express words limiting the defendant's obligation to the period during which the marriage tie subsisted.—*Quære*, whether 22 & 23 Vict. c. 61, s. 5, applies to deeds made before the passing of the Act. Charlesworth *v.* Holt - - - 38

SERVICE OF PROCESS—Foreign company 345
See Foreign Judgment.

SHAREHOLDER—Foreign company—Elected domicile - - - - 345
See Foreign Judgment.

SHIP—Bill of lading—Weight of goods - 74
See Weight in Bill of Lading.

SHORT NOTICE OF TRIAL - - - 42
See Notice of Trial.

STATEMENT DISPARAGING GOODS - 218
See Libel.

STATUTE OF FRAUDS - 1; Ex. Ch. 307
See Frauds, Statute of.

STATUTE OF LIMITATIONS - - 99
See Covenant for Title.

STATUTES:

11 Geo. 4 & 1 Wm. 4, c. 68, ss. 1, 2 - 67
See Carriers Act. 1.

11 Geo. 4 and 1 Wm. 4, c. 68, s. 8 - 93
See Carriers Act. 2.

3 & 4 Wm. 4, c. 42, s. 3 - - - 99
See Covenant for Title.

5 & 6 Wm. 4, c. 50 - - - - 309
See Highway Board.

6 & 7 Wm. 4, c. 71 - - - - 45
See Interrogatories as to Title.

5 & 6 Vict. c. 79, s. 4 - - - 330
See Passenger Duty.

7 & 8 Vict. c. 85, ss. 6, 8, 9 - - 330
See Passenger Duty.

STATUTES—*continued.*

8 & 9 Vict. c. 20, ss. 47, 61 - - 157
See Duty to fence. 1.

—— Vict. c. 20, s. 68 - - - 176
See Duty to fence. 2.

13 & 14 Vict. c. cix. - - Ex. Ch. 60
See Pension.

15 & 16 Vict. c. 76, s. 124 - - 205
See Committal under Debtors Act, 1869.

18 & 19 Vict. c. 111, s. 3 - - - 74
See Weight in Bill of Lading.

21 & 22 Vict. c. 98, s. 24 - - - 302
See Contract by Corporation. 3.

22 Vict. c. 61, s. 5 - - - - 38
See Separation Deed.

25 & 26 Vict. c. 61 - - - - 309
See Highway Board.

—— c. 89, ss. 8, 9, 10, 12 - - Ex. Ch. 224
See Contract by Corporation. 2.

26 & 27 Vict. c. 92, s. 6 - - - 157
See Duty to fence. 1.

29 & 30 Vict. c. 90, s. 10. - - - 209
See Covenant to pay "Outgoings."

32 & 33 Vict. c. 14, s. 39, subs. 6 - - 25
See Tax on Carriages.

—— c. 62, s. 5 - - - - 205
See Committal under Debtors Act, 1869.

—— c. 71, s. 87 - - - - 147
See Execution Creditor.

STATUTORY DUTY—*Contagious Diseases (Animals) Act*, 1869.] When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss.—The defendant, a shipowner, undertook to carry the plaintiffs' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, s. 75:—*Held*, that the object of the statute and the order being to prevent the spread of contagious disease among animals, and not to protect them against perils of the sea, the plaintiffs could not recover. Gorris *v.* Scott - - - 125

SUPPORT—Minerals - - - 99
See Covenant for Title.

SURVEYOR OF HIGHWAYS—Trespass - 309
See Highway Board.

TAX ON CARRIAGES—*Exemption—Carriages used solely for the Conveyance of any Goods or Burden in the Course of Trade—32 & 33 Vict. c. 14, s. 39, subs. 6.*] The business of a travelling circus is not a trade, and carriages belonging to a circus, and used for carrying the band and other performers in a parade through the town, are not carriages "used solely for the conveyance of any goods or burden in the course of trade," so as to be exempt from duty under 32 & 33 Vict. c. 14, s. 19, subs. 6. Speak *v.* Powell - - - 25

TERMS APPLICABLE TO YEARLY TENANCY 50
See Occupation under void Demise.

TITHE RENT-CHARGE—Apportionment - 45
See Interrogatories as to Title.

TITLE—Interrogatories - - - 45
See Interrogatories as to Title.

TITLE, COVENANT FOR—Breach - - 99
See Covenant for Title.

TRESPASS—Corporation—Individual members
See Highway Board. [309

TROVER—Conversion—Appropriation - 86
See Evidence of Conversion.

—— Vendor's lien - - - - 54
See Right to bring Trover.

TRUST FOR CONVERSION—Probate duty 29
See Probate Duty. 2.

"**TWELVE MONTHS CERTAIN**"—*Master and Servant—Service for "Twelve Months certain"—Notice—Continuance of Service beyond the Twelve Months.*] The defendant agreed to serve the plaintiff as a traveller and agent "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice:"—*Held* (by Bramwell and Pigott, BB., Kelly, C.B., dissenting), that at the close of the twelve months the agreement could be determined by either party without any notice, and that the stipulation as to a three months' notice only applied in case the engagement was prolonged beyond the twelve months. Langton *v.* Carleton - - 57

ULTRA VIRES—Contract by company [Ex. Ch. 224
See Contract by Corporation. 2.

VAULT—Burial fee - - - - 214
See Burial Fee.

WARRANTY—Contract—Plans and specifications - - - - - 163
See Implied Warranty.

WATER, COLLECTION OF - Ex. Ch. 64
See Duty of Owner of Land.

WEIGHT IN BILL OF LADING—*Action for Freight—Difference between Weight of Cargo shipped and Weight expressed in Bill of Lading—Estoppel—Foreign Bill of Lading—Contract made in France—Bills of Lading Act* (18 & 19 *Vict. c.* 111), *s.* 3.] To an action for a lump sum for freight by the master of a ship against the indorsee of a bill of lading the defendants pleaded, except as to 217 tons of cargo, that by the bill of lading the plaintiff acknowledged himself to have

WEIGHT IN BILL OF LADING—*continued.*
received a number of tons exceeding 217 tons, and that he did not carry or deliver the goods in the bill of lading mentioned, but only a portion, to wit, 217 tons (not alleging in terms that he did not carry all the goods delivered). The plaintiff replied (3.) that he carried all the goods delivered to him under the bill of lading, and that the goods so delivered and described in the bill of lading as weighing more than 217 tons in fact weighed 217 tons only, and that the weight mentioned in the bill of lading was a mere misdescription, inserted without fraud or default; (4.) that the bill of lading was made in France, and that, according to the law of France, the whole freight was payable, although part only of the goods was carried and delivered; and (5.) repeating the allegations of the third replication, and adding that the bill of lading was made in France, and that, according to the law of France, the whole freight was payable. On cross-demurrers:—*Held*, that the plea was ambiguous, but that, assuming it to be good, the third replication was a good answer to it, for that, in an action for freight, the master is at liberty (notwithstanding 18 & 19 Vict. c. 111, s. 3) to shew that the cargo actually received by him differs in weight from that signed for in the bill of lading, at all events where the weight mentioned in the bill of lading is mere matter of measurement; and that the freight being a lump sum the plaintiff was entitled to recover the whole.—*Held* also, that the fourth and fifth replications were good. Blanchet *v.* Powell's Llantivit Collieries Company, Limited 74

WORDS—"Cattle" - - - - - 176
See Duty to fence. 2.

"If necessary" - - - - - 42
See Notice of Trial.

"Outgoings" - - - - - 209
See Covenant to pay "Outgoings."

"Parcel or package" - - - - 67
See Carriers Act. 1.

"Proceeds of such sale" - - - 147
See Execution Creditor.

"Twelve months certain" - - - 57
See "Twelve Months certain."

"Used solely for the conveyance of any goods or burden in the course of trade" - 25
See Tax on Carriages.

WRONGFUL EXPULSION FROM PARTNERSHIP
See Mutual Insurance Society. [190

YEARLY TENANCY—Terms applicable to 50
See Occupation under void Demise.

END OF VOL. IX.

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